

Indiana Law Review



Volume 30 No. 1 1997

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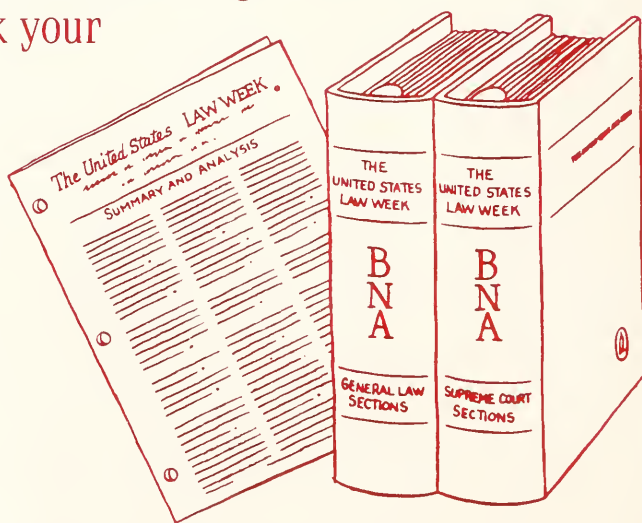
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Apology

In Issue Four of Volume 29 of the *Indiana Law Review*, an article appeared entitled, *1995 Survey of Indiana Commercial Code*. This article was based on a draft manuscript solicited from Professor Bruce A. Markell of the Indiana University School of Law—Bloomington. After Professor Markell withdrew the article, a misunderstanding within the editorial staff of Volume 29 of the *Review* caused the article to be published with numerous changes not approved by Professor Markell, and attributed to Diane Rae Hurtt. Ms. Hurtt does not claim the article as her own. The *Indiana Law Review*, however, wishes to set the record straight, and apologizes to its readers and to Professor Markell for the incident and the inaccuracy.

Should readers wish to refer to the article in the future, the accurate citation would be: Comment, *1995 Survey of Indiana Commercial Code*, 29 IND. L. REV. 1127 (1996).

THE IMPORTANCE OF LEGAL HISTORY FOR MODERN LAWYERING

CHIEF JUSTICE RANDALL T. SHEPARD*

INTRODUCTION

For a profession that owes much to history, we American lawyers move all too easily through our daily work without much reference to the judgment, wisdom, and experience of those who went before us as leaders in the system of justice. This symposium is designed to record and examine some of the most interesting people and events in the history of Indiana's courts, its lawyers and its judges.

I. IGNORANCE OF LEGAL HISTORY HAS FEW EXCUSES

Our inattention to legal history is curious in many ways. First, lawyers as a group more often than not are people who studied social science as undergraduates. Indeed, the profession is full of people who majored in history during college. In the course of earning their degrees, they likely learned a great deal about the history of governments and wars, the history of social movements, and the history of commerce. They probably did not learn much, however, about the role of the legal profession or even the courts.¹ Law schools give their students a fair instruction in various substantive legal fields, but usually not a great deal about the history of legal institutions. There are precious few opportunities to learn it later.

Aside from what we picked up on our way to becoming lawyers, the whole profession operates in substantial part, one might say, on the basis of history. We use our basic legal education, which bears unmistakable resemblance to the common law catalogued by Sir William Blackstone, by acting like common law lawyers. "What have the courts said about the law in this field? Is there a case on the question my client has brought to me?" These are questions natural to a legal system based on the rule of precedent. It is very much a rule of history.

Of course, there are a few circles in which legal history thrives and produces regular writings. These subjects range from those of wide interest, like the evolution of tort doctrine, to true esoterica, like a piece concerning the evolution of Russian secured transaction law before 1917.² On a broader front, bar associations publish pieces about famous milestones³ and about associations of

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1. A leading exception to this rule is probably the widespread understanding of the role lawyers and judges played in desegregation of America's schools, beginning with *Brown v. Board of Education*, 347 U.S. 483 (1954).

2. Konstantin Osipov, *The Genesis of Russian Secured Transaction Law Before 1917*, 42 CLEV. ST. L. REV. 641 (1994).

3. James E. Farmer, *Women in the Law: A Centennial Legacy of Antoinette Daken Leach*, 7 RES GESTAE 106 (1993).

lawyers.⁴

There may be a stronger message about lawyers and history in the fact that you can count on lawyers as people who enjoy telling and hearing stories about the profession. Lawyers' lounges or vacant jury rooms in county courthouses are still places where counsel trade tales about cases and people. This is consistent with the common law tradition, in which judges, lawyers, and law students met in the English inns of court to debate cases and rules of law. Modern lawyers may be wanting in our formal study of legal history, but you can generally persuade a lawyer to tarry a moment at the courthouse to hear the end of a story about some famous case or clever advocate. It is that spirit which motivated the Indiana Supreme Court to invite collaboration with the *Indiana Law Review* to stage this symposium.

II. HISTORY OF SUBSTANTIVE LAW

During a period when so much is governed by statutes,⁵ one is continually amazed at how much of our daily work involves the common law made by courts. As I remarked earlier, the common law, and the rules of precedent and stare decisis which accompany it, constitutes a system that looks backwards. Still, the common law has never been considered a static code.⁶ It has always been understood that common law evolves over time to meet the demands of the day, in what Justice Brent E. Dickson has called: "the march of Indiana common law."⁷

The best advocates in this sort of legal environment are those who know that urging a court to move the law somewhere new is best undertaken when you know where the law has been. As Judge Robert Grant once said during a ceremony admitting new lawyers, "Never move a fence until you understand why it was built there in the first place."

The benefit of being so equipped is all too easy to overlook. In the late 1980s, the Indiana Supreme Court set for oral argument a civil case in which the trial

4. The Indiana State Bar Association, for example, celebrated its centennial year with a commemorative edition of *Res Gestae* about the history of the profession and the association. See *RES GESTAE*, Sept. 1996.

5. The "Niagara" of new statutes tells quite a story. The 1893 Indiana Legislature enacted 380 pages of new laws. Fifty years later, the 1943 legislature enacted 1070 pages of new laws. In 1993, it enacted 4919 pages of new laws. The executive branch does the same thing, of course. Fifty years ago there was no such thing as the Indiana Register. Last year the Indiana Register published 2639 pages of new, revised, or proposed regulations.

6. A student written work for this symposium discusses the Indiana common law reception statute, which incorporates the English common law as it existed in the year 1607 into the law of Indiana. IND. CODE § 1-1-2-1 (1993). I think it would be a fair statement that judges of this state and others assumed they should apply English common law made in years thereafter and that one regularly encounters debate about "what was the common law" during the course of modern litigation.

7. *Morgan Drive Away, Inc. v. Brant*, 489 N.E.2d 933, 934 (Ind. 1986).

court and the court of appeals had both issued similar rulings based on a line of common law decisions running from the 1880s forward. The appealing party wrote an excellent brief about the reasons for adopting a new rule. He argued with some persuasiveness that society had changed in the intervening century and that the goals of the law in this particular field could be best met by moving on to a new formulation.

His opponent rose with only a single argument: the rule is “X,” and it means we win. He did not respond to the arguments for change, even after several questions from the bench. Exasperated, one of my colleagues threw him what I thought was a final life preserver: “What would you like us to do in this field, Mr. Jones?” “We’d like the court to follow the law.” This answer did not serve the client well.⁸

We encounter topics which are susceptible to substantive evolution all the time. Habeas corpus is a good example of a common tool used every day in the nation’s courts. It has an enormous history, and judges, even judges in high courts, are as capable as lawyers of litigating such cases without paying much attention to the substantive law of the matter.⁹ Surely, it is plain that both lawyers and judges make better law for the future if they understand what the law has been.

III. HISTORY OF LEGAL INSTITUTIONS

If we lawyers tend to overlook the evolution of substantive law, then we can be downright unconscious about legal institutions and legal practice. Practices are all too often taken for granted, and we too often repeat rituals and sustain enterprises long after their reason for being has evaporated.

When our court recently considered whether to change Indiana’s manner of citing cases, I decided it might be interesting to see when this method got its start. It certainly commenced before the infamous *Bluebook* issued by the Harvard, Yale, Columbia and Pennsylvania law reviews. A quick investigation revealed that the year of a decision, placed right after the name of parties, began appearing when the court acquired a new reporter of decisions in 1904. His name was George W. Self. It was probably a campaign promise, and it was a good one. We have been doing it that way ever since, even though the publishing world has turned upside down several times in the intervening generations.¹⁰

The same lesson may be learned on more important matters. The present fragmented structure of Indiana’s trial courts apparently flows from a conclusion

8. I remember wondering what the appellee’s lawyer must have thought about why we were holding a hearing. If you have won below, and the state’s highest court sets argument, the logical thing would be to imagine that one should be ready to *defend* the status quo rather than to take it for granted. (To the best of my recollection, the side with the argument for change prevailed.)

9. Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 NOTRE DAME L. REV. 1079 (1995).

10. We are now following *The Bluebook*, like every jurisdiction save California, but the vote to change was close, three to two. IND. APP. R. 8.2(B).

reached by someone in the 1880s that the Indiana Constitution permitted only one judge in each circuit court. Accordingly, the legislature created criminal courts, superior courts, probate courts, juvenile courts, and so on, even though it has been an article of faith in the American legal profession since 1908 that unified trial courts serve us best. Until recently, no one had seriously examined the validity of that 1880s conclusion. When the six-judge Monroe Circuit Court was created in 1990, we broke the myth that led to fragmented trial courts in our state. This was a point that could have used some earlier examination. In short, as Professor Calvin Woodard once said to a class, "We study history to free ourselves from it."

That has certainly been my experience in studying the nature of common law courts in England. As I mentioned earlier, the common law tradition was wholly an oral tradition in which judges and lawyers debated and refined points of law. The same tradition guided the appellate courts. These higher courts were places where counsel argued appeals from a list of authorities provided to the court in advance; the arguments went on for as long as the judges thought necessary, and then the judges announced a decision. This system was transplanted to the English colonies in America, and it largely prevailed in the colonial period and well on into the 19th century.¹¹

Although the history of such appeals is illuminating, it is but a prelude to the fact that modern British appellate courts have retained this oral tradition. That is, appeals still occur without a transcript, without briefs, without formal time limits for argument, and without the judges issuing written opinions. It should be thought-provoking for modern American lawyers and judges, buried as we are under mounds of paper. It is an important lesson, one that starts as history and ends as comparative law.

The current debate about the nature of legal education, of course, owes a great deal to history. Law firms complain that new law graduates know something about substantive law but not very much about drafting documents or organizing client matters.¹² Law schools have heard these complaints, which have been flowing now for a decade or two, and they have made substantial provision for courses and clinical experiences in everything from drafting briefs to counseling clients. Many in the bar are still not satisfied and argue for less academics and more hands-on opportunities. Of course, this is exactly where legal education in the United States started out—with students "reading the law" in a lawyer's office

11. For example, appellate judges in eighteenth and nineteenth century England delivered their decisions *seriatim*, with each member of the panel announcing his own reasons for voting a particular way. RICHARD A. POSNER, *THE FEDERAL COURTS* 227 n.7 (1985). This tradition gained some ground in early American practice, but it soon gave way to a system by which one member of the panel signed an opinion outlining the views of the majority. *Compare* *Chisolm v. Georgia*, 2 U.S. (1 Dall.) 419 (1793) (opinions delivered *seriatim* by each of the five Justices), *with* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (Marshall, C.J., writing for the Court).

12. The MacCrate Report, issued by the American Bar Association in 1992, was a major event in this debate. The debate still rages. *See generally* *Legal Education and Professional Development—An Educational Continuum*, 1992 A.B.A. SEC. ON LEGAL EDUC. AND ADMISSIONS TO BAR.

to qualify for admission to the bar. Rejecting that manner of training as inadequate, the legal profession worked hard in the late nineteenth and early twentieth century to convert lawyering into an academic subject.¹³ Although the debate over the proper balance in law schools curricula should continue, the contribution to this discussion by practitioners would be more constructive if more practitioners possessed broader knowledge about where the profession took legal education over the last 150 years.¹⁴

In short, we are likely to benefit from careful examination of historical ways of doing business. We are often timid about the reform of legal structures because we assume they stand on more hallowed ground than history demonstrates.

IV. THE HISTORY OF GREAT PEOPLE

Whenever I consider the contributions of people such as the three justices who have served on the Indiana Supreme Court for more than twenty-five years, I am reminded of the words musician Tom Lehrer used in praising the life's work of one of the world's greatest composers: "It is a sobering thought that when Mozart was my age he had been dead for three years."

It is not by accident that the walls of university buildings and public courthouses frequently display the names of great lawgivers. Such people are an inspiration to carry on.

Inevitably they give us many lessons. One is a lesson in determination and adaptability to change. Issac Blackford became a judge during the first year of statehood when our government fit nicely in the statehouse in Corydon, and he departed after the new constitution was written and the nation was preparing for a civil war. Roger O. DeBruler came to the court when Lyndon B. Johnson was President, and I was a college senior, and he stayed long enough to become one of the first members of the court to draft opinions using a computer. Richard M. Givan first became part of the court's life as a law clerk in 1951, and he stayed until his secretary, Jackie Anders, learned to put opinions on the computer. He once told me that he had in his lifetime known personally one-third of all the people who served on the Indiana Supreme Court.

These justices are worth remembering because we have had the good fortune to be their colleagues and friends. They are worth memorializing, however, for other reasons, the reasons for which their fellow citizens will remember them. Like so many other judges and like so many great lawyers, their fellow citizens will remember them for what they did for our society.

The history of the legal profession is one replete with landmarks in the advancement of American society. Lawyers and judges in this state and others led the fight against slavery in the last century and the fight against segregation in this century. Lawyers and judges opened up the democratic system by bringing cases

13. James P. White, *Reflections on American Legal Education*, Address for the St. John's University Distinguished Lecture Series 4-8 (May 1, 1985) (transcript on file with author).

14. Randall T. Shepard, *Classrooms, Clinics and Client Counseling*, 18 OHIO N.U. L. REV. 751 (1992).

like *Baker v. Carr*.¹⁵ Our profession helped create modern prosperity in business and industry by developing reliable commercial rules and agreements, enforceable across state lines and even national boundaries. We created the tools with which modern America has made so much progress in cleaning up the environment. We are a major force in the protection of children and others unable to care for themselves.

In short, the profession's contributions to substantive law and America's institutions are worth memorializing, worth remembering, and worth praising. We owe it to the profession and to our fellow citizens to record the best of that story. This symposium is a splendid way to do that.

15. 369 U.S. 186 (1962).

TRIBUTES

ON THE RETIREMENT OF JUSTICE ROGER O. DEBRULER

CHIEF JUSTICE RANDALL T. SHEPARD*

As the Indiana Supreme Court works its way towards being two centuries old, the court has experienced in rapid succession the retirement of two of the most prominent justices in its history.

Not since the adoption of the current constitution brought to a close the nearly thirty-six-year career of Justice Isaac N. Blackford in 1853 has anyone left the court after so long a term of service. Justice Roger O. DeBruler's twenty-eight years on the court began during the court's final partisan elections and concluded at a moment when all the members have been appointed under the Missouri Plan adopted by the voters who re-elected Justice DeBruler in 1970.¹ Just as the court changed in this period, so did the society itself. DeBruler arrived at the supreme court during the turbulent 1960s and served until one of those Baby Boomer war protesters had found his way to the White House.

Roger DeBruler has been serving on the supreme court during my entire career as a lawyer. Indeed, he signed the certificate admitting me to the bar. It was a singular honor and a great personal and professional pleasure to end up serving with him for the last eleven years. I am glad to have this chance to share a few thoughts about his work on the court.

One cannot help but start with the sheer monumentality of Roger DeBruler's contribution as it appears in the case reporters. He wrote some 1750 opinions during his service on the supreme court. Of these, about 890 were majority opinions, 590 were dissents, and 270 were concurrences.

Roger was famous for staking out a position as a dissenter and holding to it until he managed to recruit enough converts to carry the day. Some of these campaigns lasted a long time. Almost everybody who served with Roger eventually became part of such a story. My own most memorable conversion occurred during a debate on the operation of the rule for obtaining a change of judge in a post-conviction proceeding. I had always understood that the rule contemplated an automatic change of judge, just as in civil cases. In a well-publicized 1991 death penalty case, I succeeded in forging a majority to order a

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1. The third longest-serving justice, of course, was Richard M. Givan, who won election in the fall of 1968 and retired in January 1995. The two men thus sat beside each other at the court's conference table for more than a quarter of a century. Both also served as chief justice.

change of judge over Roger's dissent.² In the course of some later discussion about rule amendments, however, Roger took great lengths to describe the court's original agreement about changes of judge in post-conviction cases, and his explanation finally turned on a light bulb in the duskier recesses of my mind. When the matter came around again in the context of an actual case, I voted with Roger and found myself writing the following:

The Whiteheads seize on language in this author's opinion in *State ex rel. Rondon v. Lake Superior Court* (1991), Ind., 569 N.E.2d 635, to contend that once a petitioner has complied with the form required by the rule, the trial judge is obliged to grant the motion for a change of judge. Actually, although a majority saw fit to order a change of judge in *Rondon*, the better description of the operation of the rule is found in Justice DeBruler's dissent. *Id.* at 636.³

Reading this opinion sometime later, our new colleague Justice Frank Sullivan, Jr., said to me: "I only recently realized how totally you capitulated."⁴

Roger DeBruler worked out these and thousands of other cases with a cordiality and a care for detail that made working with him both delightful and instructive. In the several thousand working days we served together, I can remember but a single time that he raised his voice in anger.

The body of Roger's work reflects in many ways his own assessment about the lives and aspirations of his fellow Hoosiers.⁵ It is on the whole a positive assessment. In a recent case about search and seizure of garbage left at the curb, Justice DeBruler painted a fine picture about this place called Indiana:

[T]he inhabitants of this state have always valued neighborliness, hospitality, and concern for others, even those who may be strangers. Here, an open front walk leading to the front porch of a house is accurately judged by the passerby to be an open invitation to seek temporary shelter in the event of a sudden downpour. Stepping on that part of a yard next to the street or sidewalk to seek shade from a tree or to pick edible yet valueless plants growing in the lawn has been regarded

2. *State ex rel. Rondon v. Lake Superior Court*, 569 N.E.2d 635 (Ind. 1991).

3. *State ex rel. Whitehead v. Madison Circuit Court*, 626 N.E.2d 802, 803 (Ind. 1993).

4. In my own defense, I record here a similar exchange that occurred after one of the court's appointees became a problem. I had wanted someone else in the first place, but a three-justice majority including Justice DeBruler had carried the day on the appointment. When push came to shove and a change needed to be made, Roger said in conference that it was all my fault. "My fault!" I said, "You're the one who voted for him." "Yes," replied Roger, "but if you had been more eloquent in stating your position I probably would have done the right thing in the first place."

5. Being a Hoosier means a good deal to Justice DeBruler. My law clerks tell me that he has used the word "Hoosier" more times in his opinions than anybody on the court, just a bit ahead of me. It is not an accident that Roger's biography in the court's brochure reads straightforwardly: "A native of Evansville, Indiana, and a product of Hoosier schools and universities."

proper conduct. It is permissible for children at play on the street or in the alley to examine the contents of garbage cans to find interesting items, so long as they do not make a mess. It is not infrequent that valuable items are placed in the trash in hopes that someone passing by will see them there and will take them and make good use of them. It has often been said that if you do not want others to know what you drink, don't put empties in the trash.⁶

Justice DeBruler has been especially firm about the importance of automobiles in the everyday lives of Hoosiers. In another search and seizure case, he wrote:

Americans in general love their cars. It is, however, particularly important, in the state which hosts the Indy 500 automobile race, to recognize that cars are sources of pride, status, and identity that transcend their objective attributes. We are extremely hesitant to countenance their casual violation, even by law enforcement officers who are attempting to solve serious crimes.⁷

These descriptions of Hoosier life and countless other observations about important topics, legal and societal, constitute a distinguished body of work that is cited from county courthouses to the U.S. Supreme Court.⁸

Standing right alongside DeBruler the adjudicator all these years has been the somewhat more elusive DeBruler the person. Countless times during the past eleven years, people have posed questions more or less like the one former Governor Robert D. Orr asked me within a few months of my appointment: "What's that fellow really like, anyway?"

It always seemed that Roger heard drummers whose beat the rest of us could only dimly surmise. I always thought the spirit of the man had been captured by the first group photograph taken after he came to the court in the fall of 1968. In this picture, the newest thirty-something Democrat justice sits up proudly in a full 1960s beard (fluffed up, no doubt, during the bicycle ride over from Lockerbie Square) and faces the camera with a restrained grin that says: "I'm not like them." By "them," Roger frequently meant the Republicans on the court.

With those justices and others, Roger relished the give and take of debating cases. And, he developed an elegant way of bringing discussions to the close. On those days when even his lengthiest effort to corral a majority failed, Justice DeBruler would turn toward me and say, "Chief, I think we need to come to closure on this case." Sometimes he would simply bark out, "Closure!" We all knew what this meant.

There were a few such habits that long seemed mysterious even to supreme court justices. Justice DeBruler always referred to us by using our titles, even in the most informal situations. "Justice Dickson, can you go to lunch today?" or

6. *Moran v. State*, 644 N.E.2d 536, 541 (Ind. 1994).

7. *Brown v. State*, 653 N.E.2d 77, 80 n.3 (Ind. 1995).

8. *Schiro v. Farley*, 510 U.S. 222, 237-38 (1994) (Blackmun, J., dissenting); *Duckworth v. Eagan*, 492 U.S. 195, 216-217 (1989) (Marshall, J., dissenting).

“Justice Selby, I failed to record your vote in this case. What was it?” For a very long time, I viewed this practice as a method Justice DeBruler used for placing some distance between himself and those around him. I finally came to understand that it was in fact a gentle way of affirming his respect for the office and the officeholder.

Justice DeBruler was an ardent fan of Indiana University, utterly undeterred as he found himself surrounded by Boilermakers, Michiganders, Dartmouths, and Princetonian Yalies.

He was an ardent Democrat (except when adjudicating). He was a man who proved that many of us judicial appointees do still remember where we came from and feel continuing gratitude to those who gave us the chance to be supreme court justices.

Justice DeBruler was a daily watcher of Wall Street, completely conversant with the intricacies of investing in municipal bonds.

He is a man who lifted our hearts even when he talked about his own plans for retirement. “I understand you plan to spend some time in France,” said one of my colleagues over our last lunch together. “How long will you be there?” “A year,” replied Roger. “When will you be going?” “After the winter in Martinique,” Roger said.

Those of us who have served on the court with Roger DeBruler will miss him “sorely bad.” We take heart, however, by reflecting on the great gift he has given us and the rest of his fellow Hoosiers. The gift is his very career, about which we might say, in the poet’s words inscribed in brass at the Statehouse rotunda: “Ain’t God Good to Indiana?”

A TRIBUTE TO JUSTICE ROGER O. DEBRULER

JUSTICE FRANK SULLIVAN, JR.*

It is reliably reported that several years ago, upon encountering a member of the Indiana Supreme Court, a U.S. Supreme Court Justice asked, “Why is it that, in every case we get from your court, Justice DeBruler has dissented?”

It is true that Justice Roger O. DeBruler, who retired from the Indiana Supreme Court on August 8, 1996, after nearly twenty-eight years of service, wrote many dissents. Among the most memorable were his dissents¹ arguing that the death penalty violated the Indiana Constitution’s requirement that the “penal code . . . be founded on the principles of reformation, and not of vindictive justice[;]”² that the Indiana abortion control statute violated women’s constitutional rights “to privacy and basic liberty, guaranteed by the . . . Fourteenth Amendment[;]”³ that the Indiana “nude dancing” statute was invalid because, by declaring all public nudity a crime, it “swe[pt] constitutionally protected conduct within its proscription[;]”⁴ and that due process required the post-conviction remedy be more widely available to those seeking relief from guilty pleas.⁵ In other dissents, Justice DeBruler set forth for the first time many principles and procedures relating to the imposition of the death penalty that have now become a standard part of Indiana death penalty practice.⁶

Justice DeBruler’s dissents are noteworthy for the legal principles they espouse, but they are noteworthy in another respect as well. They contain no personal attacks on the majority, no sarcasm, no headline-grabbing rhetoric of any kind. These two characteristics of Justice DeBruler’s dissents—their legal power and their civility—have resulted not only in the dissents standing the test of time but also in the dissents later being adopted as the majority view of the court and, in several instances, by the U.S. Supreme Court.

For example, his dissent in *Kerlin v. State*,⁷ arguing that certain evidence of prior offenses was inadmissible, was later adopted by the court in *Lannan v. State*;⁸ his dissent in *Patterson v. State*,⁹ arguing that certain out-of-court

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1. *Judy v. State*, 416 N.E.2d 95, 111 (Ind. 1981) (DeBruler, J., dissenting); *Adams v. State*, 271 N.E.2d 425, 431 (Ind. 1971) (DeBruler, J., dissenting), *modified* 284 N.E.2d 757 (1972).

2. IND. CONST. art. I, § 18.

3. *Cheaney v. State*, 285 N.E.2d 265, 274 (Ind. 1972) (DeBruler, J., dissenting), *cert. denied*, 410 U.S. 991 (1973).

4. *Erhardt v. State*, 468 N.E.2d 224, 226 (Ind. 1984) (DeBruler, J., dissenting); *State v. Baysinger*, 397 N.E.2d 580, 587-88 (Ind. 1979) (DeBruler, J., dissenting).

5. *White v. State*, 497 N.E.2d 893, 906-908 (Ind. 1986) (DeBruler, J., dissenting).

6. *See, e.g., Spranger v. State*, 498 N.E.2d 931, 958 (Ind. 1986) (DeBruler, J., dissenting) (weighing of aggravating and mitigating circumstances “the most critical stage of the death sentence determination”).

7. 265 N.E.2d 22, 25-27 (Ind. 1970) (DeBruler, J., dissenting).

8. 600 N.E.2d 1334, 1339 (Ind. 1992).

9. 324 N.E.2d 482, 488 (Ind. 1975) (DeBruler, J., dissenting).

statements were inadmissible hearsay, was adopted by the court in *Modesitt v. State*;¹⁰ and his dissent in *State ex rel. Rondon v. Lake Superior Court*,¹¹ arguing for limitations on a petitioner's right to a change of judge in post-conviction relief cases, was adopted by the court in *State ex rel. Whitehead v. Madison County Circuit Court*.¹² In three dissents, Justice DeBruler argued that Thomas Schiro's death sentence should be set aside in part due to the jury's unanimous recommendation against death; on his last day in office, a majority of the court agreed.¹³ In addition, following the position advocated by Justice DeBruler in dissent, the U.S. Supreme Court reversed decisions of the Indiana Supreme Court in *Thomas v. Review Board of Indiana Employment Security Division*¹⁴ and *Jackson v. Indiana*.¹⁵

Although these and other dissents are memorable, Justice DeBruler was also the author of many significant majority opinions for the Indiana Supreme Court, a small sampling of which is listed here. In *Grody v. State*,¹⁶ he authored a decision which invalidated, as unconstitutionally overbroad, a statute under which Indiana University students had been prosecuted for failure to leave school premises when requested by university officials. In *Lewis v. State*,¹⁷ he set forth special procedural limitations on the use of statements by juveniles accused of crimes. In *Reilly v. Robertson*,¹⁸ he wrote a landmark decision invalidating gender-specific actuarial tables on equal protection grounds.

Justice DeBruler wrote the well-known opinions of the Indiana Supreme Court affirming the constitutionality of the Indiana Medical Malpractice Act,¹⁹ shielding utility customers from the costs of the abandoned Marble Hill and Bailly nuclear projects,²⁰ and holding that environmental damage was covered by businesses' general comprehensive liability insurance in Indiana.²¹ Additionally, he made

10. 578 N.E.2d 649, 652-53 (Ind. 1991).

11. 569 N.E.2d 635, 636 (Ind. 1991) (DeBruler, J., dissenting).

12. 626 N.E.2d 802, 803 (Ind. 1993).

13. Schiro v. State, 669 N.E.2d 1357 (Ind. 1996).

14. 450 U.S. 707 (1981) (holding that the denial of unemployment compensation to an employee who refused reassignment to an armament assembly line in accordance with his religious beliefs violated the employee's rights under the Free Exercise Clause), *rev'g* 391 N.E.2d 1127 (Ind. 1979).

15. 406 U.S. 715 (1972) (holding that the indefinite commitment based on mere existence of pending criminal charges in a mental health institution of a deaf and partially blind defendant of limited intelligence violated the Due Process Clause of the Fourteenth Amendment), *rev'g* 255 N.E.2d 515 (Ind. 1970).

16. 278 N.E.2d 280 (Ind. 1972).

17. 288 N.E.2d 138 (Ind. 1972).

18. 360 N.E.2d 171 (Ind. 1977), *cert. denied* 434 U.S. 825 (1977).

19. Johnson v. St. Vincent Hosp., 404 N.E.2d 585 (Ind. 1980).

20. National Rural Util. Co-op Fin. Corp. v. Public Serv. Comm'n, 552 N.E.2d 23 (Ind. 1990) (Marble Hill); Citizens Action Coalition of Ind., Inc. v. Northern Ind. Pub. Serv. Corp., 485 N.E.2d 610 (Ind. 1985) (Bailly).

21. American States Ins. Co. v. Kiger, 662 N.E.2d 945 (Ind. 1996).

important contributions with majority opinions, too numerous to list here, in criminal, evidence, and tort law.

As the legacy of his opinions—both dissenting and majority—reflects, Justice DeBruler was a judge's judge, able to set aside all prejudice and outside influence and focus only on the law and the merits of the case before him. The strength of his intellect and courage of his convictions have deeply influenced Indiana law for over a quarter-century. It is hard to envision the Indiana Supreme Court without him.

JUSTICE DEBRULER AND THE DISSENTING OPINION

KENNETH M. STROUD*

INTRODUCTION

I am honored to contribute to this symposium on the history of the Indiana courts, and I commend the Indiana Supreme Court and the *Indiana Law Review* for sponsoring such an interesting and informative event. For my part, I have been asked to make some comments about Justice Roger O. DeBruler, the second-longest sitting justice in the history of the Indiana Supreme Court. Upon his retirement on August 8, 1996, he had served almost twenty-eight years on the court, second only to the legendary Isaac N. Blackford who served for thirty-six years. DeBruler was born and raised in Evansville, Indiana. He served three years in the U.S. Army and graduated from Indiana University School of Law—Bloomington in 1960. His judicial career began at age twenty-nine when he was appointed to the Steuben Circuit Court in 1963 by Governor Matthew E. Welsh. He won the general election for that office in 1964, receiving more votes than President Lyndon B. Johnson and Democratic Governor Roger Branigin. Governor Branigin appointed him to the Indiana Supreme Court on October 1, 1968 to fill a vacancy caused by the death of one of its members, Judge Donald R. Mote. At that time, Justice DeBruler was thirty-four years old, making him the second youngest person to sit on the Indiana Supreme Court to date.

In 1970, Justice DeBruler ran for election to the court under the old system.¹ He was nominated at the Democratic State Convention and subsequently defeated his Republican opponent. Also on the ballot that year was a provision amending the Indiana Constitution by eliminating the system of electing judges to the court on a political basis and replacing it with the current system of appointing new members to the court.² This amendment was adopted by the voters. Therefore, DeBruler was the last member of the Indiana Supreme Court who went through the traditional political electoral process to gain membership on the court. DeBruler is also the only Indiana Supreme Court Justice to cite to the State Poem in an opinion.³

During his long tenure, Justice DeBruler wrote well over 500 dissenting opinions. Does this fact have any significance for evaluating his contribution to the operation of the court? I will examine several of his dissents to explore the role of dissenting opinions and their contribution to the appellate process.

We can only understand the role of dissenting opinions by placing them in the

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1. IND. CONST. art. VII, § 2 (as amended 1881) (amended 1970). The 1970 amendment substantially changed this section. It now deals with the number of members on the Indiana Supreme Court. *Id.*

2. *Id.* § 10; IND. CODE §§ 33-2.1-4-6 to -7 (1993).

3. *Williams v. State*, 256 N.E.2d 913, 918 (Ind. 1970) (DeBruler, J. dissenting) (citing Act of Mar. 11, 1963, ch. 220, § 1, 1963 Ind. Acts 301 (codified at IND. CODE § 1-2-5-1 (1993))).

procedural context in which they arise. In a typical case, a party seeks review in the Indiana Supreme Court from an adverse judgment received in a trial court or in the court of appeals. The documents presented to the court for review are the judgment, the record of the trial proceeding and the briefs submitted by both sides. If the case is on transfer, there will also be an opinion by the court of appeals. Ideally, the issues to be decided have been narrowed and framed in such a way which clearly reveals the either-or nature of each issue presented to the court.

After the record and briefs have been filed with the supreme court, the court's internal procedures provide for the case to be assigned to one of the justices to draft the court's opinion. Even before this draft opinion is written, there will likely be informal discussions among the justices about the case. Eventually, the justice assigned to write the draft opinion issues it in the form of a majority opinion and circulates it to all other members of the court. It is only at this point that the *possibility* of a dissenting opinion arises. If all of the justices vote to concur in the draft opinion, then it becomes the court's opinion, and there will be no dissenting opinion. However, the final version of such a unanimous opinion may have been shaped by informal discussions among the justices, some of whom may have disagreed with some portions of the draft opinion. Also, the final opinion may have been written with some compromises in order to command a unanimous vote. These discussions and/or negotiations are not recorded, so it is impossible to know whether they occurred or what effect they had on the final opinion. If these discussions do not resolve the justices' differences, one or more of the justices may draft a dissenting or concurring opinion and circulate it to the members of the court. At this stage, the draft dissent is an in-house device that aids the deliberative process of the court and is circulated only to its members.

The draft dissent offers a counter holding to that of the draft majority opinion. The purpose of circulating it is to change the content of the draft majority opinion *before* the final vote. This can only be successful if it persuades a majority of the judges to prefer the dissent's opinion to the draft majority opinion on any given issue. There are a variety of specific changes or additions that could be sought by the dissenter. The goal could be to induce the author of the majority opinion to correct errors in the reasoning contained in the opinion or to change the case's disposition. This could be based on the view that the rule to be adopted is not theoretically wrong, but that it is unworkable in practice or beyond the jurisdictional power of the court to create. The dissent also could offer a way to narrow the scope of the opinion while retaining its ultimate holding. Finally, the dissent could be attempting to expand the majority opinion by persuading the author to explicitly address issues the dissenter believes are fairly presented by the case and not adequately discussed in the majority opinion.

A draft dissent will necessarily enhance the supreme court's deliberative process. The fact that the draft dissenter has made the effort to write a draft dissent should cause the other members of the court to re-examine their positions. Whatever the ultimate result, the draft dissent plays a vital role in the rational deliberative process by which appellate decisions are made. Of course, the dissent's rational persuasive force is not the only consideration affecting the other judges. This draft dissent is, at the same time, a threatened *published* dissent. The *possibility* of publication provides added inducement for all of the justices to give

careful consideration to both the draft majority opinion (which may have been altered to address points made in the draft dissent) and the draft dissent, because, if the dissent is published, the justices will be forced to choose which opinion they wish to associate themselves with publicly.

If the author of the draft dissent is not successful in achieving the changes sought, the question of whether to *publish* the dissent arises. This is an altogether different question facing the dissenting justice because the purpose of a *published* dissent cannot be to convince the court to decide the matter differently in that particular case. That attempt has already been unsuccessful.

What is the justification for publishing the dissent, despite the fact that there are obvious social costs involved in doing so? For example, publication of the dissent could strain relations on the court, eroding the collegiality that is essential to the court's deliberative process. It could also erode public confidence in the court's ability to determine by rational processes what the law is. The public may be dismayed to see a difference of opinion on the court with each side claiming to have the correct answer. It could weaken the force of the rule of stare decisis by making the majority opinion less persuasive and thereby creating uncertainty in the lower courts and among attorneys as to which is the correct rule and how long it will prevail. Lastly, a dissenting opinion could undermine the certainty of rulings in those cases where certainty is more important than the substance of the rule. The dissenter should understand these costs when the dissenter decides to publish the dissent. Ideally, the judge determines that publication is justified because the benefits of the dissent outweigh the costs in that particular case. What considerations support such a determination by a supreme court justice?

The dissenter is consciously appealing to a wider audience than the members of the court deciding *that case*. He must believe that the constituents of this wider audience should be brought into the ongoing deliberative process for their contribution to it in the future, after the dissent is published. The published dissent is essentially future-oriented, and this wider audience includes those who might be influenced by the dissent and react favorably to it in the long run. The potential members of the dissenter's intended audience include:

1. *The Supreme Court of Which the Dissenter Is a Member*.—That court, as then constituted, rejected the dissenter's position in the case at hand or there would have been no question of *publishing* a dissent. However, the dissenter may be trying to influence the court in future cases dealing with similar issues. He may be hoping that some members of the court will change their minds over time or, more likely, he is counting on the inevitability of the court gaining new members. When a similar issue arises, and the new members consult this precedent, the dissent will be an essential part of the case and may be persuasive to them.

2. *Attorneys Who Practice in This Area of the Law*.—The dissent may encourage attorneys to continue litigating the issue in future cases, to preserve the issue in the trial court for appeal, to create more complete trial records, and possibly to provide a basis for the court taking judicial notice of any legislative facts supporting its position. As the rule announced in the majority opinion is litigated in different cases with different facts, the defects in that rule may be revealed, and the superiority of the dissenter's position may become apparent to

the court. This occurred in *Patterson v. State*.⁴ In that case, the court radically redefined the hearsay rule. Out-of-court statements not under oath made by witnesses who were subject to cross-examination at trial were, after *Patterson*, admissible as non-hearsay.⁵ Justice DeBruler dissented, stating:

Under the principle created by the majority, the cross-examination will come long after the witness gave the statement in some police station as part of the police investigation and by necessity will focus on the recollection of the witness of the circumstances in which the statement was made rather than upon the recollection of the witness of the events described in the statement.⁶

He predicted the unworkability of the new rule in practice and also demonstrated the rule's deleterious effect on the efficacy of cross-examination. In *Modesitt v. State*,⁷ the court finally overruled *Patterson* because experience with the rule in a variety of cases revealed the practical defects in its application.

3. *Trial Courts*.—The dissenter's audience will also include trial courts who are bound by the majority opinion, but who may, in practice, adopt certain suggestions made in the dissenting opinion because of the wisdom or practicality of the point made. For example, the majority opinion may uphold the trial court's written sentencing order in a criminal case as minimally adequate. The dissent, in arguing for a higher standard, may influence other trial courts to adopt the suggested technique as a way to improve the process, as well as ensuring that they avoid reversal for an inadequate order.

4. *Various Commentators on the Law*.—This audience would include law professors, law review editors, bar magazine writers, presenters in continuing legal education (CLE) programs, etc. The dissent may persuade these commentators of the importance of its position, and they may, in turn, make it known to their respective audiences.

5. *Organizations That Have an Interest in the Case*.—These groups may agree with the dissent and work to change the law. For example, they may lobby the legislature, publish stories in the press, file amicus curiae briefs, or otherwise engage in activities aimed at changing the law.

6. *The Losing Attorneys in the Case*.—The plausibility of their arguments has been recognized by the dissent; they may be encouraged to seek rehearing in that court or review in a higher court, e.g., by seeking certiorari in the U.S. Supreme Court. If certiorari is granted, the dissent's opinion could be used in the deliberative process in that Court.

Justice Brennan, in discussing dissents by U.S. Supreme Court Justices, has stated that certain dissents "reveal the perceived congruence between the

4. 324 N.E.2d 482 (Ind. 1975).

5. *Id.* at 484-85.

6. *Id.* at 488 (DeBruler, J., dissenting).

7. 578 N.E.2d 649, 652 (Ind. 1991). The history of the *Patterson* rule is well described in 13 ROBERT L. MILLER, INDIANA PRACTICE, EVIDENCE § 801.307 (2d ed. 1995). The current approach to this issue is found in Indiana Rules of Evidence 801(d)(1).

Constitution and the ‘evolving standards of decency that mark the progress of a maturing society’ and that seek to sow seeds for future harvest.”⁸ In these dissents, he believes, the judge is speaking with a “prophetic” voice.⁹

It is important, as a matter of history, to honor judges who, by “transcend[ing] without slighting, mechanical legal analysis,”¹⁰ author opinions which are deemed by later courts as correct and just. However, it is important not to carry this idea of the prophetic dissent too far because it is problematic on two counts. First, the characterization is necessarily based on hindsight, and second, the “winning” dissenter’s position may itself be reversed by a later case.

An attribution to a dissenting opinion of “prophetic” status can only be given in hindsight. It is only *after* the past dissent has been accepted by a later court as correct that we could know that the dissent was “prophetic.” Thus, the fact that a dissent turned out to be “prophetic” is not a justification for publishing the dissent *when the decision was made to publish it*.

To call a dissent prophetic when published is an anomalous use of the word because we cannot then know whether the dissent has correctly perceived the direction of the development of the law. The word is honorific, conclusory, and celebratory. Although a dissenter may hope and believe the dissenting opinion is prophetic, he cannot know when he decides to publish it whether history will accord it that status or not. Moreover, an attempt at prophecy by a dissenting judge alone is, in my opinion, not a proper reason for publishing a dissent.

Because the word “prophetic” is honorific in this context, it assumes, without analysis, that the later decision accepting the dissenter’s view is, itself, a correct decision. This seems to be a case of the winners awarding honorific titles to their own precursors. It is possible that the dissent and the later decision upholding the dissenter’s view are both incorrect and will be reversed in the future. If this happens, does it mean the original majority’s opinion was prophetic?

If we focus on when the decision to publish the dissent is made, we recognize that the dissenter is necessarily making that decision with deep uncertainty about the future development of the law. The most that the dissenter can have is the belief that the dissent presents the correct view of the law and that the benefits of publishing it outweigh the costs. The judge *can* be certain that it is a vital part of the appellate court’s rational deliberative process which includes publishing dissents aimed at a wider audience than the then-members of the court.

There are three distinct issues involved in understanding the role of dissenting opinions. First, what is the purpose of the in-house draft dissent? Second, what is the purpose in *publishing* such a dissent? Third, can we ever make the later assessment of whether, in fact, the published dissent succeeded in persuading any part of the wider audience to adopt the dissenter’s position? The latter is a question of historical fact and will seldom be capable of empirical determination.

To explore these issues, I will discuss several of Justice DeBruler’s dissents

8. William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 431 (1986) (footnotes omitted).

9. *Id.*

10. *Id.* at 432.

and their fate at the hands of different parts of the wider audience.

I. THE DEPRAVED SEXUAL INSTINCT RULE AND *LANNAN v. STATE*¹¹

In *Kerlin v. State*,¹² the defendant was convicted of consensual sodomy with a fifteen-year-old boy. At trial, the State introduced testimony from two adult male witnesses who separately claimed that they had engaged in illegal sexual relations with the male defendant approximately six to eight years prior to the trial.

The defendant objected on the grounds that this evidence of unrelated misconduct by the defendant was a form of character evidence offered to prove the defendant's general tendency to commit such acts and was inadmissible in evidence against the defendant for that purpose.¹³ The majority agreed with the defendant that Indiana adhered to the general rule that evidence of other unrelated offenses offered to prove the defendant's propensity to commit such acts was inadmissible for that purpose. However, the court held that in prosecutions for crimes involving a "depraved sexual instinct," such as sodomy, there was an exception to that general prohibition.¹⁴ This exception made evidence of similar unrelated acts admissible to prove the propensity of the defendant to commit such acts and could be used as circumstantial evidence to prove the defendant committed the acts for which he was on trial.¹⁵

Justice DeBruler dissented, stating:

There was no connection between the offenses and the offense being tried. This testimony was not offered as bearing on an issue such as motive, intent, identity; nor could it evince any common scheme or plan, etc. This evidence was offered for the purpose of showing the appellant's character was bad and that he had a tendency to commit acts of sodomy. As such it was inadmissible. Evidence of other offenses cannot be admitted merely in an attempt to show some predisposition of the accused to commit criminal acts or to establish some likelihood that he might do so.

Even where offered to prove some issue such as intent, motive, knowledge, identity or a common scheme or plan, evidence of prior offenses might be properly excluded by the trial court if it deems the evidence as being too remote to be of probative value. But in the case at hand this testimony was not offered to prove any issue before the court and was, therefore, inadmissible regardless of the remoteness or closeness in time of the prior offenses.¹⁶

11. 600 N.E.2d 1334 (Ind. 1992).

12. 265 N.E.2d 22 (Ind. 1970).

13. *Id.* at 24-25.

14. *Id.* at 25; the depraved sexual instinct rule was applicable in prosecutions for incest, sodomy, criminal deviate conduct, and child molesting. See *Lannan*, 600 N.E.2d at 1335.

15. *Kerlin*, 265 N.E.2d at 25.

16. *Id.* at 26-27 (DeBruler, J., dissenting).

DeBruler would have abolished the depraved sexual instinct exception and required the admissibility of such evidence to be tested by its logical and legal relevance to some appropriate issue in the case, i.e., other than the defendant's propensity to commit such acts. And even if the evidence were offered to prove such an appropriate issue, the trial court could still exclude the evidence on the ground that it was too remote to be of probative value.

In *Lannan*, the Indiana Supreme Court wrote a lengthy opinion re-examining the history and bases for the depraved sexual instinct rule. The court identified two bases for this exception to the general rules on character evidence. There was a high rate of recidivism among "sexual deviates."¹⁷ Therefore, the fact that a defendant had previously committed similar acts would be probative of whether he did so in this particular case. There was also a need to bolster the victim's testimony where the victim was a child in order to overcome the common reluctance to believe that a normal adult could do such a thing to a child.¹⁸ The court acknowledged that, although both of these rationales had merit in at least some cases, "any justification for maintaining the exception in its current form is outweighed by the mischief created by the open-ended application of the rule."¹⁹ In *Lannan*, the State introduced evidence that the defendant had previously committed acts of depraved sexual conduct. This evidence was offered to prove that the defendant had a propensity to commit the charged crime. The mischief here is that it invited a jury to conclude that because the defendant had previously acted in a certain way, he probably did so in the present case.²⁰ The jury might use that inference to convict where they might not do so without the propensity evidence. Thus, its conceded probative value was outweighed by the potential prejudice²¹ from its use. In *Lannan*, Chief Justice Shepard stated:

The notion that the state may not punish a person for his character is one of the foundations of our system of jurisprudence. Evidence of misconduct other than that with which one is charged ("uncharged misconduct") will naturally give rise to the inference that the defendant is of bad character. This, in turn, poses the danger that the jury will convict the defendant solely on this inference.²²

Lannan identifies a problem with this evidence that stems from considerations of fairness, rather than from logical relevance. The *Lannan* court acknowledged society's need to convict sexual predators. But the court would not respond to this need by sacrificing the traditional protection of Anglo-American criminal jurisprudence—we do not convict people for who they are. This is an ethic

17. *Lannan*, 600 N.E.2d at 1338.

18. *Id.* at 1337-38.

19. *Id.* at 1338.

20. This was a permissible inference under the depraved sexual instinct rule.

21. The *Lannan* court made a previously permissible inference into an impermissible inference.

22. *Lannan*, 600 N.E.2d at 1338.

entirely consistent with the presumption of innocence and the desire to “get it right” when society punishes a criminal wrongdoer. This “getting it right” not only involves the aim of being correct in a factual sense (i.e., the defendant actually did it), but also of being right in a normative sense—the manner in which the state goes about taking a citizen’s liberty has to be understood by all to be just. Using evidence of the defendant’s past or subsequent conduct to prove he is a bad person and may have a propensity to commit such acts seems out-of-bounds. It may be very probative in many cases, but the idea of openly using it leaves a sense of unease, a sense that the state convicted the person because of the kind of person he is or has been, rather than for committing the offense charged.

In abolishing this rule, the *Lannan* court described *Kerlin* and quoted from DeBruler’s dissenting opinion. The court then made this remarkable statement about that dissent: “Twenty-two years later, Justice DeBruler has carried the day. His reasoning tracks the language of Federal Rule of Evidence 404(b), which we hereby adopt in its entirety, effective from this day forward.”²³ Indiana subsequently adopted its own version of Rule 404(b) which is substantially similar to the Federal Rule.²⁴ *Lannan* should, therefore, continue to influence Indiana evidence law for the foreseeable future.²⁵

When Justice DeBruler decided to publish his dissent in *Kerlin*, he did not know whether the Indiana Supreme Court would ever adopt his position. The justification for deciding to publish it had to be that he believed it was the correct position on an important legal issue; he hoped that his dissent would invite the wider audience to contribute to the deliberative process which would, over time, contribute to the best rule prevailing.

In hindsight, this dissent helped bring about the change in Indiana evidence law urged by its author. The Indiana Supreme Court did abolish the depraved sexual instinct rule and attributed some credit to Justice DeBruler’s dissent. He turned out to be “right.” The dissent was not by itself a *sufficient* condition for bringing about the change. If it had been, it would not have been published as a dissent because it would have prevailed in the *Kerlin* case itself. We cannot be sure what factors bring about complex social events such as the supreme court abolishing an old rule and adopting a new one. However, we know that Justice DeBruler, by dissenting, contributed all that he could have to a rational deliberative process, which includes inviting the wider audience to enter the debate on one side or the other.

Not surprisingly, other courts have dealt with the issue raised in *Lannan*. Some courts have taken positions similar to the *Lannan* court.²⁶ Other courts have retained a muted form of the depraved sexual instinct rule despite the fact that

23. *Id.* at 1339.

24. IND. R. EVID. 404(b). The only difference is the omission of opportunity as a listed purpose.

25. See e.g., *Clark v. State*, 668 N.E.2d 1206, 1211 (Ind. 1996); see also *Sloan v. State*, 654 N.E.2d 797, 799-800 (Ind. Ct. App. 1995), *trans. denied*.

26. See e.g., *State v. Carter*, 662 A.2d 289, 291 (N.H. 1995).

their jurisdictions have adopted a form of Rule 404(b).²⁷

Even if Justice DeBruler “carried the day” in *Lannan* by convincing three of his four colleagues on the Indiana Supreme Court, he still may have been wrong.²⁸ Justice Givan disagreed and authored an opinion advocating the retention of the depraved sexual instinct rule.²⁹ The U.S. Congress also disagreed. The Federal Rules of Evidence 413 and 414³⁰ were enacted by Congress as part of the Violent Crime Control and Law Enforcement Act of 1994.³¹ After the passage of these new evidence rules in the Act, the Supreme Court Advisory Committee recommended reconsideration,³² but Congress failed to act on the recommendation. Federal Rules 413 and 414 are broad rules of admissibility in criminal cases of sexual assault and child molestation; any evidence of the defendant’s commission of another offense of sexual assault or child molestation is admissible and “may be considered for its bearing on any matter to which it is relevant.”³³ Evidence of past offenses admitted under this rule may be used to prove that a defendant acted in conformity with those other offenses on the occasion in question. This is a modern version of the depraved sexual instinct rule.³⁴

It should also be noted that the Indiana Legislature also disagreed with DeBruler’s position as adopted by the Indiana Supreme Court in *Lannan*, and enacted a statute which apparently attempts to reinstate a version of the depraved

27. See e.g., *State v. Frazier*, 464 S.E.2d 490, 494 (N.C. Ct. App. 1995) (“North Carolina courts have been consistently liberal in admitting evidence of similar sex offenses in trials on sexual crime charges.”) (citations and internal quotations omitted); see also *Tabor v. State*, 529 N.W.2d 915, 919 (Wis. Ct. App. 1995) (“We conclude that *Lannan* is unpersuasive.”).

28. The *Kerlin* case really involved two separable issues. One was the logical relevance of prior *consensual* adult homosexual conduct to prove sodomy on a child. The other was the propriety of admitting this evidence, even after the determination of logical relevance. The modern practice is to exclude evidence of consensual homosexual conduct. See e.g., *State v. Lawton*, 667 A.2d 50, 55 (Vt. 1995) (evidence of prior homosexual conduct should be excluded because it is prejudicial).

29. *Lannan*, 600 N.E.2d at 1341 (Givan, J., concurring).

30. In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant’s commission of another offense or offense of sexual assault is admissible and may be considered for its bearing on any matter to which it is relevant. FED. R. EVID. 413(a).

In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant’s commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant. FED. R. EVID. 414(a).

31. Pub. L. No. 103-322, § 320935, 108 Stat. 1796, 2135-37 (1994).

32. JUDICIAL CONF. OF THE UNITED STATES, REPORT ON THE ADMISSION OF CHARACTER EVIDENCE IN CERTAIN SEXUAL MISCONDUCT CASES (1995), reprinted in 159 F.R.D. 51 (1995).

33. FED. R. EVID. 413.

34. Under these rules, evidence of consensual sex acts between adults would not be admissible as they were in *Kerlin*.

sexual instinct rule.³⁵ Under this statute, in a child molesting case, evidence that the defendant has committed another act of child molesting against the same victim or a similar act against a different victim “is admissible.” This would seem to include situations where the relevance of the evidence is to prove the defendant’s *propensity* to commit such acts, indicating that there is some likelihood he committed the charged act. However, the statute also states that this evidence may be excluded if the probative value is substantially outweighed by certain listed probative dangers.³⁶ Although the Indiana Court of Appeals has declared this statute a nullity because it conflicted with common law evidence

35.

(a) In a prosecution for child molesting under IC 35-42-4-3, a prosecution for incest under IC 35-46-1-3, or a prosecution for an attempt or a conspiracy to commit child molesting or incest, evidence that the defendant has committed another crime or act of child molesting or incest or attempted or conspired to commit another crime or act of child molesting or incest:

- (1) against the same victim; or
 - (2) that involves a similar crime or act of child molesting or incest against a different victim;
- is admissible.

IND. CODE § 35-37-4-15(a) (1993).

36.

(c) The court shall hold a hearing out of the presence of the jury regarding the admissibility of the evidence described under subsection (a). Even if the court determines that the evidence is relevant, the evidence may be excluded if the probative value of the evidence is substantially outweighed by:

- (1) the danger of:
 - (A) unfair prejudice;
 - (B) confusion of the issues; or
 - (C) misleading the jury; or
- (2) considerations of:
 - (A) undue delay;
 - (B) waste of time; or
 - (C) needless presentation of cumulative evidence.

However, if the court finds that all or some of the evidence is admissible, the court shall enter an order stating what evidence may be introduced.

(d) This section may not be construed to limit the right to introduce evidence at a trial that would otherwise be admissible to prove any of the following:

- (1) Motive.
- (2) Opportunity.
- (3) Intent.
- (4) Plan.
- (5) Knowledge.
- (6) Identity.
- (7) Absence of mistake or accident.

Id. § 35-37-4-15(c)-(d) (1993).

rules then in effect,³⁷ it demonstrates that not all parts of the wider audience agree with DeBruler and the *Lannan* court on this issue.

When major lawmaking institutions like Congress and state legislatures take a view directly contrary to a court, it makes it difficult to say that this dissent anticipated the direction of the development of the law in this area. At present, we simply do not know the direction of the law. This is not to say that Justice DeBruler's *Kerlin* dissent was wrong and the *Lannan* majority was wrong to adopt it. I believe they were both correct; *Lannan* was a valuable change in Indiana law. However, the value of dissents cannot be measured by positing some ability of certain judges to perceive the "enduring values" in the law and the direction of the tide of history so as to ride it to prophetic status.³⁸

The less grand and more modest hope for the dissenting judge is that by bringing a wider audience into the deliberative process, the best rule will emerge in the long run. Rather than seeing dissents as attempts at prophecies, they should be seen as commitments to a rational deliberative process coupled with a tenuous hope that the dissenter's view will prevail over time.

II. COMPETENCE TO STAND TRIAL—*JACKSON V. STATE*³⁹

Theon Jackson was a mentally deficient twenty-seven-year-old deaf-mute, blind in one eye, who had never been to school, could neither read nor write, and had only a rudimentary understanding of sign language. He was charged with two counts of robbery of street corner newspaper sellers; the amount allegedly taken totaled nine dollars.⁴⁰ He was declared incompetent to stand trial based on the testimony of two psychiatrists and a teacher from the State School for the Deaf.⁴¹ They agreed that he could not "comprehend the nature of the charges against him nor assist in his defense because he had a mental deficiency and also because he had almost no means of communication."⁴² The witnesses also agreed that he had virtually no chance of becoming sufficiently competent "to be tried, even if he could gain a means of communication."⁴³ The teacher testified that he knew of no facilities in the state which could help him and that the State School for the Deaf did not accept mentally retarded persons.⁴⁴

The Indiana statute then in effect required the trial court, upon a finding of

37. *Day v. State*, 643 N.E.2d 1 (Ind. Ct. App. 1994); *Brim v. State*, 624 N.E.2d 27 (Ind. Ct. App. 1993). This result is no different under the present evidence rules. IND. R. EVID. 101(a).

38. It should be noted that DeBruler's dissent in *Kerlin* may have been wrong when written, yet right when adopted by *Lannan*. The rationale for any rule can change or even disappear due to changing social conditions and values. A good rule for one historical era is not necessarily a good rule for a different era.

39. 255 N.E.2d 515 (Ind. 1970).

40. *Id.* at 518 (DeBruler, J., dissenting).

41. *Id.* at 515-16.

42. *Id.* at 518.

43. *Id.*

44. *Id.*

incompetency to stand trial, to order the defendant committed to the Department of Mental Health until he "shall become sane."⁴⁵ If and when the defendant became sane, he would then be returned to the court and put on trial for the pending charges.⁴⁶

On appeal, the defendant argued that this statutory procedure denied him due process of law because the unlikelihood of his improvement made his commitment permanent and, in effect, a life sentence.⁴⁷ The majority opinion disposed of that argument:

Appellant[']s argument, that the statute in question is unconstitutional because it imprisons appellant possibly for life, must fail. The legislature under its police power may provide for the safety, health, and general welfare. This necessarily includes the confinement, care and treatment of the mentally defective, retarded or insane.⁴⁸

This was the entire portion of the opinion which addressed the defendant's constitutional argument.

Justice DeBruler wrote a dissent which stated, in part:

The statute clearly contemplates a delay in the trial or a postponement, which implies that the commitment to the psychiatric institution is a temporary one.

When the defendant's condition is permanent, as in this case, and he cannot be helped by any known psychiatric technique, then the defendant cannot be committed under this statute because the purpose of the commitment cannot be accomplished.

What then is the purpose of the confinement of this appellant whose condition is permanent[?] Punitive? Protection of society? Protection of the appellant? Confinement to serve any of these purposes based merely on a trial court finding that [the] appellant "has not comprehension to understand the proceedings and make his defense," in my opinion, would violate the due process clause of the 14th Amendment to the United States Constitution. Appellant has not been convicted of any crime, nor found to be dangerous to the community or to himself. It has not been shown that he cannot continue to live in our society as he has for twenty-seven years. What conceivable reason is there for committing this appellant to a psychiatric institution, for what is in effect, life?

Clearly, the real basis for this commitment is the existence of the criminal charges against appellant. This is shown by the fact that if those charges were to be dismissed because another person confessed and plead

45. Act of Mar. 5, 1951, ch. 238, § 2, 1951 Ind. Acts 682, 683-84 (amended by Act of Mar. 11, 1967, ch. 291, sec. 2, § 2, 1967 Ind. Acts 946, 947-48) (codified as amended at IND. CODE § 35-5-3-2 (1971)) *repealed by* Act of Feb. 18, 1974, No. 148, § 4, 1974 Ind. Acts 630, 631-32.

46. *Id.*

47. *Jackson*, 255 N.E.2d at 516.

48. *Id.* at 518.

guilty to those crimes, or the complainant admitted he had lied in making the charges, the commitment of appellant under [this statute] would obviously be ended. Thus, the existence of unproved criminal charges operates to keep appellant confined in a state institution for life. This is a blatant violation of the due process clause of the 14th Amendment to the United States Constitution.⁴⁹

The core of this argument is that the length of a commitment must be justified by a court's finding of a legitimate purpose for the commitment. In effect, the statute equated the existence of criminal charges against an incompetent person with a finding that civil commitment of the person was necessary.

DeBruler also argued that this permanent commitment violated the Equal Protection Clause. He stated that the existence of the criminal charges against the defendant was not a rational basis for treating him in a radically different manner than a person civilly committed upon a finding that such commitment was required for his own welfare or for the welfare of others.⁵⁰

This case was then heard by the U.S. Supreme Court which reversed the Indiana majority opinion and issued an opinion agreeing with DeBruler's dissent that the commitment of Jackson in this case violated both the Equal Protection Clause and the Due Process Clause.⁵¹ In discussing the due process violation, the Court stated:

Jackson was not afforded any "formal commitment proceedings addressed to [his] ability to function in society," or to society's interest in his restraint, or to the state's ability to aid him in attaining competency through custodial care or compulsory treatment, the ostensible purpose of the commitment. At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.

We hold, consequently, that a person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant. Furthermore, even if it is determined that the defendant probably soon will be able to stand trial, his continued commitment must be justified by progress toward that goal.⁵²

Although the Supreme Court did not explicitly mention DeBruler's dissent, it did

49. *Id.* at 519 (DeBruler, J., dissenting).

50. *Id.*

51. *Jackson v. Indiana*, 406 U.S. 715 (1972).

52. *Id.* at 738 (alteration in original) (footnote omitted).

adopt the same reasoning that he relied upon.⁵³ A similar thing happened in *Thomas v. Review Board of the Indiana Employment Security Division*.⁵⁴ The Indiana Supreme Court held that the denial of unemployment compensation benefits to the petitioner, who had quit his job because of his religious beliefs, did not violate the Free Exercise Clause.⁵⁵ Justice DeBruler dissented, arguing that the petitioner's free exercise right had been violated.⁵⁶ The Supreme Court reversed the Indiana Supreme Court on the same grounds relied upon by DeBruler in his dissent, although it did not explicitly refer to the dissent in its opinion.⁵⁷ Of course, the result in neither *Jackson* nor *Thomas* means that the U.S. Supreme Court would not have granted certiorari or reversed the case but for DeBruler's dissent. That clearly could not be proven and is distinctly implausible.

However, the decision to publish a dissent does not rest on the likelihood that it will in fact influence the U.S. Supreme Court to take some action. There are other parts of the wider audience who will pay closer attention to an Indiana Supreme Court opinion. The central problem in *Jackson* was the inadequacy of the Indiana statutory procedures for committing a criminal defendant who was incompetent to be tried. The majority opinion did not agree that there was a defect in the statutory scheme, much less a constitutional defect.⁵⁸ The majority opinion contained only three sentences on this constitutional issue.⁵⁹ Obviously, DeBruler's draft dissent had not changed the majority's mind.

However, the Indiana Legislature subsequently adopted a new statute incorporating the U.S. Supreme Court's limitations on civil commitment of defendants deemed incompetent to be tried.⁶⁰ Again, there is no factual basis for saying DeBruler's dissent caused the legislature to act. But it is not implausible to believe that it contributed to that result.

Even if certiorari had not been granted and the legislature had not changed the procedure, the published dissent could have influenced the criminal trial courts and attorneys to conduct the competency hearing in order to avoid the problems with the statutory scheme pointed out by the dissenting opinion.

53. In *Reed v. Farley*, 512 U.S. 339, 345 (1994), the Court quoted from DeBruler's majority opinion in *Reed v. State*, 491 N.E.2d 182, 185 (Ind. 1986). The more likely situation would be a dissenting Supreme Court Justice quoting from DeBruler's dissenting opinion. See *Schiro v. Farley*, 510 U.S. 222, 237-38, 242 (1994) (Justice Blackmun, in dissent, quoted from DeBruler's dissenting opinion in *Schiro v. State*, 451 N.E.2d 1047, 1065 (Ind. 1983), and Justice Stevens, also in dissent, quoted from DeBruler's dissent in *Schiro v. State*, 533 N.E.2d 1201, 1209 (Ind. 1989)).

54. 391 N.E.2d 1127 (Ind. 1979).

55. *Id.* at 1133-34.

56. *Id.* at 1136-37 (DeBruler, J., dissenting).

57. *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707 (1981).

58. *Jackson*, 255 N.E.2d at 518.

59. *Id.*

60. IND. CODE §§ 35-36-3-1 to -4 (1993).

III. THE CONSENSUAL SODOMY STATUTE—*DIXON V. STATE*⁶¹

In *Dixon*, the defendant was charged under the old Indiana criminal statute prohibiting sodomy, defined as the “abominable and detestable crime against nature with mankind or beast.”⁶² He was convicted of this offense based upon proof that he had committed cunnilingus, which had already been held to fall within this statute.⁶³ The Indiana Supreme Court affirmed Dixon’s conviction.⁶⁴

Justice DeBruler dissented on two distinct grounds. He found the statute void for vagueness and violative of an individual’s constitutionally protected “zone of privacy.” Justice DeBruler argued that the sodomy statute was void for vagueness under the Due Process Clause of the Fourteenth Amendment.⁶⁵

It is a fundamental principle of our system of law in Indiana that a statute attempting to create a public offense must convey an adequate description of the evil intended to be prohibited so that a person of ordinary comprehension subject to the law can know what conduct on his part will render him liable to its penalties A statute which does not do this also violates the due process clause of the Fourteenth Amendment to the United States Constitution.⁶⁶

DeBruler then analyzed the statute, phrase by phrase, as well as each case relied upon by the majority; he concluded that neither the statute nor the case law supplied the fixed meaning required, i.e., a person of ordinary comprehension could *not* know what conduct was prohibited.⁶⁷

The only reason ever offered by this court as to why this first clause of the statute is not void for vagueness is that it would offend delicate sensibilities to describe the conduct that is prohibited. The court in effect has held it justifiably vague. Whatever may have been the merits of that position in 1913[,] it has none now.⁶⁸

Therefore, DeBruler concluded, the statute was void for vagueness and could not support a criminal charge or conviction.⁶⁹

The U.S. Supreme Court did not agree with DeBruler’s position. In *Rose v. Locke*,⁷⁰ that Court affirmed a conviction for the act of cunnilingus under a Tennessee sodomy statute⁷¹ which was virtually identical to the Indiana statute in

61. 268 N.E.2d 84 (Ind. 1971).

62. Act of Mar. 10, 1905, ch. 169, § 473, 1905 Ind. Acts 584, 694 (repealed 1977).

63. *Dixon*, 268 N.E.2d at 87 (citing *Young v. State*, 141 N.E. 309 (Ind. 1923)).

64. *Id.*

65. *Id.* at 87-88 (DeBruler, J., dissenting).

66. *Id.* at 88.

67. *Id.* at 87-90.

68. *Id.* at 90.

69. *Id.*

70. 423 U.S. 48 (1975) (affirming conviction for *forcible* cunnilingus).

71. Act of Dec. 9, 1829, ch. 23, § 17, 1829 Tenn. Pub. Acts 27, 29-30 (codified at TENN.

Dixon. The Court held that the statute defining sodomy as a “crime against nature” was *not* void for vagueness even though that statute had never been held to cover cunnilingus prior to that prosecution.⁷² That was a stronger case for a vagueness challenge than *Dixon*; nevertheless, the Supreme Court rejected that challenge.

DeBruler also dissented in *Dixon* on the ground that the statute was an unconstitutional use of the “police power to regulate the private sexual conduct between consenting adults.”⁷³ He relied upon *Griswold v. Connecticut*⁷⁴ for the proposition that the Constitution created a “zone of privacy” protecting certain human relationships.⁷⁵ He argued that “private sexual conduct between consenting adults is within that constitutionally protected zone.”⁷⁶

The Seventh Circuit Court of Appeals had already held that the Indiana sodomy statute was unconstitutional under *Griswold* when applied to married couples.⁷⁷ However, the majority in *Dixon* distinguished that Seventh Circuit case because the acts in this case were not between husband and wife.⁷⁸ DeBruler’s dissent argued that the *Griswold* principle should not be limited to married couples:

The majority opinion offers no reason why being married should make a difference in the applicability of the statute and I believe there is none. The moral preferences of the majority may not be imposed on everyone else unless there exists some harm to other persons. Sexual acts between consenting adults in private do not harm anyone else and should be free from state regulation.⁷⁹

The U.S. Supreme Court later extended the *Griswold* “zone of privacy” to unmarried people, thus precluding the state from restricting access to contraception.⁸⁰ However, when the Court was faced with the issue of whether the *Griswold* zone of privacy should be extended to preclude state regulation of consensual homosexual behavior between two males, it refused to do so and

CODE § 11184 (Williams 1955)) (repealed by Act of June 12, 1989, ch. 591, § 1, 1989 Tenn. Pub. Acts 1169, 1169). (Tennessee no longer criminalizes consensual heterosexual conduct between adults. However, it retained criminal penalties for consensual adult homosexual conduct. TENN. CODE ANN. § 39-13-510 (Michie 1995). This section, however, was found unconstitutional because it violates a right to privacy founded on the Tennessee Constitution. *Campbell v. Sundquest*, 926 S.W.2d 250 (Tenn. Ct. App. 1996), *appeal denied*).

72. *Rose*, 423 U.S. at 93.

73. *Dixon*, 268 N.E.2d at 90 (DeBruler, J., dissenting).

74. 381 U.S. 479 (1965).

75. *Dixon*, 268 N.E.2d at 90 (DeBruler, J., dissenting).

76. *Id.*

77. *Cotner v. Henry*, 394 F.2d 873 (7th Cir. 1968).

78. *Dixon*, 268 N.E.2d at 86.

79. *Id.* at 90 (DeBruler, J., dissenting).

80. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

upheld the constitutionality of a state sodomy statute⁸¹ criminalizing such behavior.⁸²

Although the U.S. Supreme Court did not reach the same conclusions reached by DeBruler on these two issues, he may have contributed to change closer to home. The Indiana Legislature adopted a new criminal code in 1977.⁸³ This code abolished the old sodomy statute and *did not criminalize* consensual sex acts between adults in private, whether married or not. In addition, the non-consensual sex acts prohibited were defined with great specificity and apparently with no concern for offending “delicate sensibilities.”⁸⁴

Do either of these outcomes tell us whether DeBruler’s dissent was ultimately “successful?”⁸⁵ Probably not. However, for DeBruler, the justification for publishing this dissent must have rested elsewhere and had to exist when he decided to do it. In part, he surely had some hope that his view would eventually prevail among thoughtful people. By publishing this dissent, DeBruler attempted to bring a wider audience into the rational deliberative process. This attempt, which may or may not have succeeded, is a powerful justification for this dissent. Generally, a dissenter’s attempt to bring others into the process, even with a slim hope of prevailing, is a justification for publishing a dissent.

IV. CONTINUING THE DISSENT—THE DEATH PENALTY

American courts have accepted published dissenting opinions as a justifiable part of the deliberative process engaged in by appellate courts. However, in the case of a recurring issue that continues to be raised on appeal and involves the same issue of law, there is no consensus on the justification for the judge to *continue* dissenting after it becomes clear his is a lost cause. One example of this is the issue of whether the death penalty is a per se violation of the U.S. and/or Indiana Constitutions.

Justice Brennan has taken the position in every case before the U.S. Supreme Court involving the death penalty that the death penalty is a per se violation of the Cruel and Unusual Punishment Clause. After it became clear that the Court was not going to adopt his position, he continued to publicly dissent in every such case. He justified this practice by saying:

This kind of dissent, in which a judge persists in articulating a minority view of the law in case after case presenting the same issue, seeks to do more than simply offer an alternative analysis—that could be done in a single dissent and does not require repetition. Rather, this type of dissent

81. GA. CODE ANN. § 16-6-2 (Michie 1996) (amended 1996).

82. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

83. IND. CODE §§ 35-42-4-1 to -9 (1993 & Supp. 1996).

84. *Id.* § 35-41-1-9 (1993) (defining deviate sexual conduct); *id.* § 35-41-1-26 (defining sexual intercourse).

85. Even though the Indiana Legislature “agreed” with DeBruler, it is impossible to know whether DeBruler’s dissent contributed at all to the legislature’s decision to decriminalize those acts. If it did, then DeBruler was successful.

constitutes a statement by the judge as an individual: "Here I draw the line."⁸⁶

Justice Brennan goes on to merge this issue with the very different question of the duty of private citizens to dissent from any given prevailing view if that is what the person believes to be required. However, a judge publishing a dissenting opinion in a case before the court is always and necessarily acting in his official capacity as a judge of an appellate court and should not be speaking as an individual. Brennan did not want his argument to "sound like too individualistic a justification"⁸⁷ for continuing to dissent, nor to be taken as self-indulgence on his part. I believe, however, that is precisely what his justification amounts to. He is free to write anything he chooses as a private citizen, but when he is publishing an official opinion in a case before the court, he is, of necessity, in the role of judge. The question, then, is not what a person acting in a private capacity has a duty to do, but what is the correct thing for a judge to do when acting in his official capacity as a judge in a case. Justice Brennan never really offers a justification for the continuing dissent, but that does not mean that it is not a common practice.⁸⁸

Justice DeBruler took a different approach to dissenting when the cause is lost. In *Adams v. State*,⁸⁹ the Indiana Supreme Court affirmed the trial court's imposition of the death penalty for first degree murder. DeBruler dissented,⁹⁰ arguing that the death penalty violated the Cruel and Unusual Punishment Clause and article I, section 16 of the Indiana Constitution.⁹¹ He also took the position that it violated another section of the Indiana Constitution which requires that the "penal code shall be founded on the principles of reformation, and not vindictive justice."⁹²

The other dissenting judge called this lengthy dissent a "scholarly opinion . . . which, in my judgment, has all of the weight of legal and social merit."⁹³ However, this remains a dissenting opinion. The *Adams* case was superseded in 1972 when the U.S. Supreme Court invalidated all death penalty statutes in *Furman v. Georgia*.⁹⁴ All nine justices wrote an opinion in that case, and only two of them, Justices Brennan and Marshall, adhered to the position that the death penalty was per se unconstitutional. The Supreme Court, in *Gregg v.*

86. Brennan, *supra* note 8, at 437.

87. *Id.* at 438.

88. For an excellent article on abandoning dissents by U.S. Supreme Court Justices, see Maurice Kelman, *The Forked Path of Dissent*, 1985 SUP. CT. REV. 227 (1985).

89. 271 N.E.2d 425 (Ind. 1971).

90. *Id.* at 431 (DeBruler, J., dissenting).

91. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); IND. CONST. art. 1, § 16 ("Excessive bail shall not be required. Excessive fines shall not be imposed. Cruel and unusual punishments shall not be inflicted. All penalties shall be proportioned to the nature of the offense.").

92. IND. CONST. art. 1, § 18.

93. *Adams*, 271 N.E.2d at 443 (Prentice, J., dissenting).

94. 408 U.S. 238 (1972).

Georgia,⁹⁵ held that the death penalty was *not* per se unconstitutional, but could only be imposed if certain procedures were followed in determining the appropriateness of such a sentence. The Supreme Court rejected DeBruler's argument as far as the Eighth Amendment was concerned. The Indiana Legislature also rejected DeBruler's position and adopted a new death penalty statute⁹⁶ conforming to the Supreme Court's requirements in *Gregg*. In *Judy v. State*,⁹⁷ the first Indiana case involving the death penalty under the new statute, the Indiana Supreme Court held that the death penalty did not violate the Indiana Constitution.⁹⁸ Justice DeBruler dissented on the same grounds he relied upon in *Adams*. In *Judy*, he stated:

Ordinarily I would consider myself to be bound through the principle of *stare decisis* and would uphold this statute in an instance such as this consistent with Art. 1, §18. But as Justice Frankfurter aptly stated:

[S]tare decisis is a principle of policy and not a mechanical formula of adherence to latest decision, however recent and questionable, when adherence involves collision with prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.

Since considering this question in the *Adams* case, substantial views have surfaced which bear directly upon the proper understanding and applications of Art. 1, § 18, in relation to the penalty of death. This matter has given an added perspective to the penalty of death which placed it again and anew upon a collision course with that state constitutional provision and calls for reconsideration. I do not therefore deem myself constricted by *stare decisis*.⁹⁹

This new issue was that the plurality opinion in *Gregg* had stated that retribution was not a "forbidden objective" of the criminal law.¹⁰⁰ DeBruler's position was that, even if that were true for the Eighth Amendment, it was not a permitted objective of Indiana criminal law because of article I, section 18 of the Indiana Constitution.¹⁰¹

In several death penalty cases¹⁰² after *Judy*, DeBruler dissented based on specific legal defects in the proceeding. He did not argue that the death penalty

95. 428 U.S. 153 (1976).

96. Act of Apr. 12, 1977, No. 340, § 122, 1977 Ind. Acts. 1533, 1595-98 (codified as amended at IND. CODE § 35-50-2-9 (Supp. 1996)).

97. 416 N.E.2d 95 (Ind. 1981).

98. *Id.* at 105.

99. *Id.* at 112 (DeBruler, J., dissenting).

100. *Gregg*, 428 U.S. at 183.

101. *Judy*, 416 N.E.2d at 113 (DeBruler, J., dissenting) (citing *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)).

102. *Dillon v. State*, 454 N.E.2d 845 (Ind. 1983); *Daniels v. State*, 453 N.E.2d 160 (Ind. 1983); *Schiro v. State*, 451 N.E.2d 1047 (Ind. 1983); *Williams v. State*, 430 N.E.2d 759 (Ind. 1982); *Brewer v. State*, 417 N.E.2d 889 (Ind. 1981).

is per se unconstitutional. Then, in *Resnover v. State*,¹⁰³ after it became clear that the court was not going to adopt his position, DeBruler cast his first vote to affirm a sentence of death, thus abandoning his position that every death sentence was per se unconstitutional.

He did not make any statement concerning the matter in *Resnover*—he simply stopped dissenting on that basis and voted to affirm the death penalty. Clearly, Justice DeBruler thought his private views irrelevant. In his role as an Indiana Supreme Court Justice, he simply recognized the force of stare decisis and accepted the majority's view as the law in Indiana. However, there would be no inconsistency if he were to join a new majority that voted to adopt the view that the death penalty is per se unconstitutional. Until then, he would simply follow the law as announced by the court. This is not to suggest it would have been improper to state his position in this matter in an opinion. There are obviously a variety of ways to handle the problem of discontinuing the dissent, and there is no consensus in the matter.¹⁰⁴

CONCLUSION

It is clear that the fate of any dissent's reasoning cannot be known when it is published, nor controlled by anything the dissenter may say in the opinion. It is future-oriented in that the dissenter hopes to influence at least some part of the "wider audience" to accept his position on the issue involved. However, the justification for publishing it is a strong commitment to the rational deliberative process of including the "wider audience"; the dissent is a constitutive element in that process. Justice DeBruler's real contribution to the Indiana Supreme Court has been in following his duty to that process for so long in what is, at bottom, a very lonely enterprise.

103. 460 N.E.2d 922 (Ind. 1984).

104. See generally Kelman, *supra* note 88. In *Seymour Manufacturing Co. v. Commercial Union Insurance Co.*, 665 N.E.2d 891, 892 (Ind. 1996), the court held that the insurance company had a contractual duty to defend the manufacturer against claims by the EPA that the manufacturer had mishandled hazardous waste materials. The court relied upon a previous, nearly identical case, of *Kiger v. American States Insurance Co.*, 662 N.E.2d 945 (Ind. 1996). Chief Justice Shepard concurred with this opinion: "Although I dissented in part from the recent decision in *American States Insurance Co. v. Kiger*. . . . I accept it as *res judicata* for purposes of this case and thus join in the Court's opinion." *Seymour*, 665 N.E.2d at 893 (Shepard, C.J., concurring). See also *Citizens Nat'l Bank of Evansville v. Foster*, 668 N.E.2d 1236, 1242 (Ind. 1996) (Sullivan, J., concurring).

**RICHARD M. GIVAN:
JUSTICE, INDIANA SUPREME COURT, 1969-1994
CHIEF JUSTICE OF INDIANA, 1974-1987**

JEROME L. WITHERED*

INTRODUCTION

Born June 21, 1921, Richard M. Givan is a fourth-generation Hoosier lawyer. His roots in Indiana go back to Dearborn County, where his great-grandfather was a lawyer and Dearborn Circuit Court Judge. His grandfather practiced law in Lawrenceburg, and his father later moved to Indianapolis where he was a lawyer and superior court judge in Marion County. Justice Givan was reared in Indianapolis, attended Indiana University and earned his law degree from the Indiana University School of Law—Indianapolis in 1951. He and his wife, Pauline, have four daughters; the youngest, Libby Givan Whipple, is the fifth-generation Hoosier lawyer in the Givan family.

During law school Givan first came into contact with the institution that would figure prominently in his professional career. Givan served as assistant librarian and law clerk for all five judges of the Indiana Supreme Court. As a law clerk, Givan researched and drafted opinions for all of the judges and came to know them intimately. At that time, the court was comprised of an extraordinary group of judges, including James A. Emmert from Shelbyville. Emmert, a former mayor of Shelbyville, Shelby Circuit Court Judge and Indiana Attorney General, was a colorful individual with a keen intellect and a concise, lucid writing style. He lived in his third floor statehouse office during the week and on Friday would drive back to Shelbyville. To this day, Justice Givan tells stories about Judge Emmert, including tales of Emmert roaming the halls of the statehouse in his bathrobe and shooting at a flock of pigeons inhabiting the statehouse lawn.

Following graduation and admission to the bar, Givan was appointed to the position of State Deputy Public Defender. From 1953 to 1964, he served as a deputy attorney general where he argued many cases before the Indiana Court of Appeals, Indiana Supreme Court, and the U.S. Supreme Court. He was also a Marion County Deputy Prosecutor, and, during the course of over seventeen years, he built a private law practice in Indianapolis.

During this time, Givan actively participated in Republican Party politics, supporting candidates and working on campaigns. In 1966, he ran for the Indiana Legislature and was elected to the Indiana House of Representatives, serving one term. While in the house, he helped shepherd through the constitutional amendment placing judges of the supreme court and court of appeals on a merit selection system.¹

In 1968, Givan had the option to run for judge of the Indiana Supreme Court.

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1. IND. CONST. art. VII, § 10.

At that time, judges of the Indiana Supreme Court and Indiana Appellate Court were elected for six-year terms. Givan campaigned hard and was nominated at the Republican Convention. In the course of the Republican victory in the fall of 1968, Givan was elected judge of the supreme court. He assumed office in December 1968.

I. OPINION-WRITING

Because of newly-elected Justice Givan's experiences as a general law practitioner and as a deputy attorney general, he was keenly aware of how supreme court decisions impact the judicial system. This awareness, coupled with his experience and expertise in the areas of criminal law and trial practice, gave him the opportunity to be a leader in opinion-writing and formulating decisions in these areas. True to his nature, Justice Givan took this opportunity, regularly writing eighty to one hundred opinions per year for the court.

Justice Givan was also very sensitive to the problems of ordinary people and practicing attorneys. One example of this sensitivity was his sparing use of footnotes. His reason: Lawyers don't have time, and clients don't have the money to pay lawyers to take the time, to read through a judge's musings on the law. Justice Givan believed that cases should be decided in a straightforward manner on the merits and without any detours into unnecessary verbiage.

II. APPOINTMENT AS CHIEF JUSTICE

In 1974, Justice Norman Arterburn decided to relinquish the office of chief justice. Arterburn had been on the bench since 1955, and he wanted to finish his career on the court without the added responsibilities of that office. The Judicial Nominating Commission considered Justice Givan and another justice for the post. Givan had been on the court for nearly six years. He also had extensive trial and appellate experience gained as a result of his private practice and his position as a deputy attorney general. He had argued dozens of cases before the Indiana Supreme Court and the Indiana Court of Appeals and, in addition, had argued *Irvin v. Dowd*² for the State of Indiana before the U.S. Supreme Court. He also had been personally acquainted with every judge who served on the Indiana Supreme Court from the late 1940s until that time. These qualifications, added to Justice Givan's knowledge of the workings of the supreme court, its institutional traditions, and the interaction of all three branches of state government made him the perfect choice for chief justice. He assumed the office of chief justice in November, 1974. In 1979 and again in 1984, he was selected for additional terms as chief justice.

III. LEADERSHIP IN THE JUDICIARY

The Indiana court system had grown and was handling many more cases in the 1970s than it had been in the early 1950s when Justice Givan was a law clerk for

2. 366 U.S. 717 (1961).

the court. Thus, in order to properly function, the court system needed a support staff and support agencies.

It has been said that a ship in a harbor is safe, but that is not where a ship should be. As chief justice, Givan did not moor in the harbor, but instead navigated uncharted waters, taking a leadership role in developing new initiatives and responsibilities for the court system's support agencies which are overseen by the Indiana Supreme Court. He was principally responsible for the creation and development of the Division of State Court Administration. That office made many improvements in caseload reporting and case management for trial courts in Indiana. The Indiana Judicial Center and the Judicial Conference, under Givan's leadership, made vast strides forward in assisting trial judges across the State. Givan helped recruit Professor William A. Kerr of the Indiana University School of Law—Indianapolis to head the Judicial Center. Under Givan's and Kerr's leadership, the Judicial Center and Judicial Conference improved their program of continuing education for the Indiana judiciary, developed research capabilities to assist trial judges, and promoted camaraderie among the state's judges. As a result of these and other changes during Givan's tenure, the office of Chief Justice of the Indiana Supreme Court evolved into the office of Chief Justice of Indiana. This evolution was for the most part a smooth one, largely due to Chief Justice Givan's able leadership.

Givan also played a key role in the development of Admission & Discipline Rule 13V.(C).³ In the early 1970s, the State Board of Law Examiners began to see significant deficiencies in the performance of law school graduates on the Indiana bar examination. The supreme court held a meeting with law school representatives and eventually developed Rule 13V.(C), which contained a set of law school courses required of graduates who take the Indiana bar exam.⁴

During the 1980s, Givan was also the driving force behind the amendment of article VII, section 4 of the Indiana Constitution. A constitutional provision, adopted in 1970, had required the supreme court to exercise original appellate jurisdiction in criminal cases in which the sentence was more than ten years.⁵ By the early 1980s, however, the volume of criminal cases left little time for the supreme court to decide civil cases. Givan spearheaded a redrafting of the constitutional provision, and along with others, worked with the legislature for its passage.

IV. BABY DOE CASE

In 1982, the supreme court faced a difficult decision which sparked a political controversy.⁶ The case involved a baby born in April 1982 in a Bloomington

3. IND. ADMIS. DISC. R. 13V.(C) (1987) (amended 1995).

4. The 1995 Amendment to Rule 13V.(C) eliminated the specific course requirements except for "legal ethics or professional responsibility."

5. IND. CONST. art. VII, § 4.

6. This chronology is taken from Dean Olsen, *The Baby and the Judge*, LAFAYETTE J. & COURIER, Oct. 28, 1984, at B1, and CHRONOLOGY OF EVENTS IN THE INFANT DOE CASES,

Hospital. The baby suffered from Down's Syndrome and a tracheoesophageal fistula, a condition in which the passage from the mouth to the stomach is not fully developed. Due to this condition, the child could not be fed orally. The attending physician recommended against emergency surgery and intravenous feeding because of the baby's minimal chance of survival. The parents accepted the attending physician's recommendation; however, other doctors in the hospital disagreed.

Unsure of its legal and medical obligations, the hospital petitioned the Monroe Circuit Court for a ruling on the matter. The trial court found that the parents had the right to choose a "medically recommended course of treatment for their child."⁷ However, the court also appointed the Monroe County Welfare Department as the child's guardian ad litem to determine whether an appeal of the court order should be taken. The welfare department investigated and decided not to appeal the court order. The next day, another guardian ad litem was appointed and, on that day, the Monroe County prosecutor filed a petition for detention, claiming the child was in need of services. The Monroe Circuit Court denied the petition. The prosecutor then petitioned the supreme court for a writ of mandamus ordering the baby to be fed intravenously.

The supreme court voted 4-0 not to intervene. The court did not consider whether the rulings of the trial court were correct, but only whether the trial court had the jurisdiction to consider the case and make a ruling. The supreme court based its unpublished ruling on the well-known restrictions on its issuance of writs of mandamus. The supreme court may only issue a writ of mandate or prohibition where either one of two circumstances is present: (1) the absence of jurisdiction by the lower court; or (2) the absolute duty of the trial court to act or refrain from acting.⁸

Although that ruling was in accord with the parents' wishes, it did not settle the controversy. Two years later, a group calling itself the "Remember Baby Doe/Retire Judge Givan Committee" began a campaign to defeat Justice Givan in his November 1994 retention vote. The committee, based in Lafayette, recruited a number of people, including law professors from Indiana University and Notre Dame, to support its position.

In response, Justice Givan formed "The Bipartisan Committee to Support Chief Justice Givan." This committee was chaired by Howard S. Young, Jr., an Indianapolis attorney, and Frank W. Campbell, a Noblesville attorney. The committee raised money, did some advertising, spread the word, and organized support groups around the state. Givan, for his part, toured the state giving interviews and holding press conferences. At an interview in Lafayette, Givan acknowledged a judge's occasional role of being in the middle of a controversy:

BIPARTISAN COMMITTEE TO SUPPORT CHIEF JUSTICE GIVAN (Oct. 1984) 1 [hereinafter BIPARTISAN COMMITTEE].

7. BIPARTISAN COMMITTEE, *supra* note 6, at 2.

8. *State ex. rel White v. Marion Superior Court*, 391 N.E.2d 596 (Ind. 1979). *See also* IND. CONST. art. VII, § 4; IND. CODE § 34-1-58-1 (1993).

Anytime we make emotional decisions, there are people who become very hyper and emotional about it. . . . You know you're going to stir up a hornets' nest. But then, you don't pay much attention to that because if you set it all on making your decision on being popular, you'd be an awful poor judge.⁹

Justice Givan eventually was retained by a wide margin.

V. THE CHIEF JUSTICE

The office of chief justice was a perfect match for Richard Givan. A decisive person by nature, he never had trouble making decisions. He always said that, as judge, he was just like an umpire calling balls and strikes: he doesn't control what pitches come to the plate, he just calls them as he sees them. And he can't delay the call. He must make a decision immediately and then wait for the next pitch. Similarly, a judge cannot control the cases which come before him. He simply must call them as he sees them and do so promptly, because more cases are on the way. Though Givan joked that, because he lived in a house with five women (his wife, Pauline, and his four daughters), he had to become a judge so he could make a decision now and then, the fact is he was very decisive as a judge and as a person.

The same was true of his tenure as chief justice. Many decisions had to be made daily on various aspects of the judiciary and the supreme court, and Givan made them without hesitation. One decision, in particular, might have generated considerable controversy had the circumstances been different, but it was still made promptly and firmly. In the spring of 1977, Governor Otis R. Bowen appointed Judge Alfred Pivarnik from Porter County to replace Justice Norman Arterburn on the supreme court. For several years, a group of people in Northwest Indiana had been criticizing Pivarnik and running a campaign against him. Givan got wind of the critics' plan to disrupt Judge Pivarnik's swearing-in ceremony. In response, Givan arranged for police to be present and ready to deal with the protestors. A police bus was made available so that the court could consider holding the protestors in contempt of court and, if necessary, haul them away. As it turned out, no one showed up to disrupt the ceremony.

He also was a straightforward individual who preferred to meet problems head-on. Several years ago, Givan was present at a meeting of the House of Delegates of the Indiana State Bar Association to give his annual State of the Judiciary message. During the meeting, the House passed a resolution urging the court to adopt an Interest On Lawyers' Trust Accounts (IOLTA) program. When Givan rose to give his message, he spoke directly to the IOLTA issue. He told the delegates that he did not believe the court would adopt an IOLTA program and that he personally was very much opposed to the idea of taking interest earned on client monies and giving it to someone else.¹⁰ That was the way you dealt with

9. *The Baby and the Judge*, *supra* note 6, at B1.

10. Givan's visceral reaction seems to have been prescient: *See* Washington Legal Found.

Richard Givan as chief justice: open, candid, and straightforward.

VI. GIVAN THE STORYTELLER

But perhaps more than anything else, Justice Givan will be remembered for his ability to tell a good story. As chief justice, his door was always open, and he was always willing to listen to anyone who had comments about the judicial system. He understood and empathized with ordinary people. He could just as easily sit down at a table and talk to a farmer or truck driver as he could a governor or legislator. And those who know him can attest that no one can tell a story like Justice Givan.

His stories about the nightly goings-on at the statehouse in the 1940s and 1950s, when some judges lived in their chambers during the week, are legendary. So are his “Givanisms,” slogans so named by his law clerks and friends. The author, who was privileged to serve as one of his law clerks in the late 1970s, can recall his returning from a meeting with the legislature in which the subject of the legislature taking over some supreme court statehouse offices was discussed. Givan was firm in his resolve not to allow the legislature to do so, because “it’s like letting the camel get his nose in the tent.” Another time, when speaking of an effort to push a bill through the legislature, he warned of putting too many provisions in the bill: “If you pile on too many apples, you can’t shove the cart.”

VII. THE LEGACY OF DICK GIVAN

To those who have known him and dealt with him, Justice Givan was remarkable for being, as he would put it, “as common as an old shoe.” Rarely did he identify himself when calling on the phone as “Justice Givan” or “Judge Givan”; he was simply “Dick Givan.”

He also had a knack for being able to laugh at himself. In the mid-1980s, a lawyer was unhappy with a decision of the supreme court affirming his client’s criminal conviction and was quoted in the newspaper as calling Justice Givan a “jackass with his head in the sand.” Givan could have taken action against the lawyer, but he declined, observing that controversy and criticism come with the job of chief justice. Instead, he brought the subject up a week later at a bar admission ceremony with several hundred persons in attendance. After relating to the crowd what the lawyer had called him, Givan said he considered suing the lawyer for slander—that is, until his fellow judges reminded him that, in a slander suit, truth is always a defense. Suffice to say, Justice Givan’s self-deprecating humor and style served the state and the judiciary well during his tenure as chief justice.

Givan retired from that office in March 1987, shortly after the Givan-led fight to change the constitutional jurisdiction of the supreme court was successful in the legislature. However, he remained on the court another seven years, retiring on December 31, 1994, after twenty-six years on the court. It was both fitting and

v. Texas Equal Access to Just. Found., 94 F.3d 996 (5th Cir. 1996) (holding that IOLTA program is an unconstitutional taking).

coincidental that his successor, Myra C. Selby, was the first African-American and first woman to serve on the supreme court. Though he was very conservative and highly critical of the social engineering of the Congress and the U.S. Supreme Court, he fiercely believed in equal opportunity for all Americans, regardless of race, gender or religion. This view of equal opportunity for all did not mean, for Givan, a mandate of equal results for all. It meant simply that every person in this country should have, under the law, the opportunity to work, to excel and to dream—and to be judged in their endeavors on their merits and without discrimination.

When Dick Givan retired from the Indiana Supreme Court in 1994, he left a legacy not just in his written opinions, but in his unique brand of Hoosier common sense and integrity. He continues to live on his farm near Plainfield, where he is an active community volunteer and a highly regarded retired member of Indiana's judiciary.

ARTICLES

THIRTY YEARS OF THE JOURNEY OF INDIANA'S WOMEN JUDGES 1964-1994

HONORABLE BETTY BARTEAU*

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INTRODUCTION

A few introductory comments must of necessity begin this Article. This Article’s primary purpose is to review the growth in the number of women judges in Indiana over the thirty-year period beginning with the first woman’s election to an Indiana court of record in 1964 through the end of 1994. This Article does not attempt to make a comparative study between the decisions of men judges and women judges, but it simply presents the progression of women judges to the bench, provides a biography of each of them, and discusses their impact on the judicial system. Because of inadequate or unavailable records, this Article will not consider women justices of the peace or women judges on town or city courts. It only reviews the women elected or appointed to county, superior, circuit, and appellate courts between 1964 and 1994. The many women who have served on courts not of record are an important part of Indiana history, for it was there that many of the first women, most not legally trained, began the acts that raised public consciousness to the point that later women were accepted in higher courts.

First, this Article presents an overview of women’s struggles to become lawyers in the United States, generally, and in Indiana, specifically. Second, this Article presents an overview of the labors of women to become judges, both nationally and locally, as well as an examination of the factors hindering women’s progress from the bar to the bench. Third, this Article examines the unique features women bring to the judiciary, followed by biographies of all of the Indiana women judges between 1964 and 1994.¹ These biographies were compiled from a questionnaire sent to the forty-six living women who have served as Indiana judges during this period.² Forty-five of these forty-six women

1. Appendix C contains the biographies of the forty-eight women who have served as judges in Indiana. Appendix C is arranged in chronological order beginning with the biography of the first woman judge to the biography of the last woman judge to ascend to the bench in 1994. An alphabetical and chronological list of the Indiana women judges can be found in Appendix A and Appendix B, respectively.

2. Questionnaires filled out by Indiana women judges, returned to the Honorable Betty Barteau, Indiana Court of Appeals (1994) (on file with the author) (summary reproduced in

responded to the questionnaire. Additionally, two judges are deceased, and their biographies, as well as that of the one failing to respond, were constructed from available records, newspaper articles and speaking with their acquaintances.³ This Article concludes with an examination of the contributions of Indiana women judges to the bench and with an attempt to gauge their impact.

I. THE GENESIS OF WOMEN IN THE LEGAL PROFESSION IN THE UNITED STATES

A. *The State Bar Experience*

In 1870, Esther McQuigg Morris, a non-lawyer, was appointed Justice of the Peace for the South Pass Mining Camp in Wyoming.⁴ With her appointment, Morris became the first of an elite group of women who have served in a judicial capacity in the United States.⁵ By the early 1900s, nearly every state required all active judges, except for municipal court judges and justices of the peace, to have formal legal training.⁶ Thus, the assimilation of women into the judiciary, a difficult task in itself, was prefaced by a far more difficult task, the assimilation of women into the legal profession. Although women were professionally active as attorneys-in-fact in the colonies, that is, women acting as lawyers for themselves, the first woman was not admitted to the legal profession until June of 1869, when Arabelle A. Mansfield passed the Iowa bar and was admitted to practice by an Iowa District Court.⁷

In 1869, section 1610 of the Iowa Code of 1851, limited admission to “any white male person, 21 years of age, who is an inhabitant of this state and . . . possesses the requisite learning”⁸ Mansfield took the bar examination despite the gender-specific language. The attorneys conducting the examination recommended her admission, stating that “she has given the very best rebuke possible to the imputation that ladies cannot qualify for the practice of law.”⁹ However, to circumvent the gender-restrictive provisions, Justice Francis Springer of the Iowa Supreme Court relied on another statute, which provided “words importing the masculine gender only may be extended to females.”¹⁰ Justice Springer held that the admission statute’s specific statement of “white male person” could not be construed as an implied denial of females’ right to be admitted to the practice of law.¹¹ Therefore, in June 1869, Arabelle A. Mansfield

Appendix C) [hereinafter Questionnaires].

3. Judge Antionette Antonellis Cordingly and Judge Susan Hay Hemminger died during their terms in office. Judge Heather Mollo did not respond to the questionnaire.

4. Larry Berkson, *Women on the Bench: A Brief History*, 65 JUDICATURE 286, 287 (1982).

5. *Id.*

6. *Id.*

7. *Id.* at 288.

8. KAREN B. MORELLO, *THE INVISIBLE BAR: THE WOMAN LAWYER IN AMERICA: 1638 TO THE PRESENT* 12 (1988).

9. *Id.*

10. *Id.*

11. *Id.*

became the first woman in the United States to be formally admitted to the bar.¹² The following year, Iowa amended its statute by removing the gender-specific language.¹³

Arabelle Mansfield's admission was accomplished without a great amount of conflict because she had the support of men in positions of power. However, at the same time, women in other states faced difficult obstacles to becoming members of the bar. For example, the Illinois Supreme Court refused to grant a license to practice law to Myra Colby Bradwell, an Illinois resident and wife of Cook County Court Judge James B. Bradwell, although she had successfully passed the required examination.¹⁴

Similar to Iowa, Illinois' statute provided that "when any party or person is described or referred to by words importing the masculine gender, females as well as males, shall be deemed to be included."¹⁵ Bradwell relied on this statute in arguing that the Illinois Lawyer Admission statute encompassed female as well as male applicants.¹⁶ She cited instances where women were necessarily included, such as the right to a trial by jury, laws of public domain, and laws of forcible detainer.¹⁷ After denying her admission, the Illinois Supreme Court sent Bradwell a notice stating "a married woman would be bound neither by her expressed contracts nor by those implied contracts which it is a policy of the law to create between attorney and client."¹⁸

Before the Civil War, the legal condition of married women was grim largely because of the influence of Blackstone's Common Law Doctrine of Femme Couverture, which Blackstone introduced to America through his commentaries.¹⁹ According to this doctrine, marriage merged a woman's legal existence into that of her husband.²⁰ As a result, she was unable to own her own property, keep control of her wages or personal effects, inherit from her husband, enter into contracts without her husband's consent, sue or be sued in her own name, initiate a divorce, or have a right of custody over her children.²¹ Because women were not entitled to vote or to otherwise have a voice in government, they had no political means to change these restrictions.²²

With Blackstone's doctrine effectively adopted, it is not surprising that the Illinois Supreme Court used it to prohibit Bradwell's admission to the bar. Undaunted, Bradwell printed the Illinois Supreme Court's notice on the front page of the *Chicago Legal News*. The *Chicago Legal News* was the first law journal

12. *Id.*

13. *Id.* at 12-13.

14. *In re Bradwell*, 55 Ill. 535 (1869), *aff'd*, 83 U.S. 130 (1872).

15. MORELLO, *supra* note 8, at 15-16 (quoting ILL. REV. STAT. ch. 90, § 28 (1845)).

16. *Bradwell*, 55 Ill. at 541.

17. MORELLO, *supra* note 8, at 16.

18. *Bradwell*, 55 Ill. at 535-36.

19. MORELLO, *supra* note 8, at 17.

20. *Id.*

21. *Id.*

22. *Id.*

printed in the west;²³ it was published by Bradwell who had learned the law by researching and writing briefs for her husband's firm.

Bradwell appealed the Illinois Supreme Court's decision, asked for a new hearing, and submitted a brief arguing that "under the laws of Illinois it is neither a crime nor a disqualification to be a married woman."²⁴ Again, she was denied admission, but the Illinois Supreme Court gave a more detailed explanation. The court stated that it was denying Bradwell the right to practice law because of custom and natural law.²⁵ Bradwell printed the Illinois Supreme Court's full opinion in her legal journal and appealed the decision to the U.S. Supreme Court. She argued that under the Fourteenth Amendment and Article IV of the U.S. Constitution, she was entitled to the same privileges and immunities as citizens of all other states and that Illinois could not bar admission on the basis of sex or race.²⁶ Two years later, all except the Chief Justice of the United States voted to affirm the Illinois Supreme Court.²⁷

According to Justice Miller's majority opinion, the decision was not based on the fact that Bradwell was a married woman, but rather was based on two other grounds. First, because Bradwell was a citizen of Illinois, the Article IV Privileges and Immunities Clause gave her no protection against Illinois courts or legislation.²⁸ Second, because admission to a state bar is not one of the privileges and immunities of U.S. citizenship, the Fourteenth Amendment did not secure the right sought by Bradwell.²⁹ The Court's ruling ensured that women would have to conduct a state by state battle to obtain the right of admission to the practice of law.

Justice Bradley's concurring opinion reflects much of the contemporary thinking at the time of the decision:

[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interest and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. . . .

23. *Id.* at 14.

24. *Id.* at 17.

25. *In re Bradwell*, 55 Ill. 535, 535-41 (1869).

26. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 130 (1872).

27. *Id.* at 142.

28. *Id.* at 138; *cf.* *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985).

29. *Bradwell*, 83 U.S. at 139.

It is true that many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state, but these are exceptions to the general rule. The paramount destiny and mission of woman are to fulfil [sic] the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.

. . . In the nature of things it is not every citizen of every age, sex, and condition that is qualified for every calling and position. It is the prerogative of the legislator to prescribe regulations founded on nature, reason, and experience for the due admission of qualified persons to professions and callings demanding special skill and confidence.³⁰

Also at this time, in June of 1870, Ada H. Kepley graduated from the Union College of Law in Chicago³¹ (now Northwestern University School of Law), becoming the country's first women law graduate.³² As it had denied Bradwell, the Illinois Supreme Court denied Kepley admission to the bar.³³ However, the circuit court of Effingham, Illinois, admitted Kepley to practice in the local county bar.³⁴ "The admitting judge said that although the Illinois Supreme Court had refused to license a woman in another case, he nonetheless believed that the motion to admit was proper and in accord with the spirit of the age."³⁵ Thus, Ada Kepley became the first woman to attend and graduate from a school of law before admission to the bar.³⁶

During this time, Alta Hulett, an eighteen-year-old woman, also applied for admission to the Illinois bar.³⁷ Hulett was unmarried and did not have the same disability to contract as the Illinois Supreme Court had used in Bradwell's case; yet she too was denied a license to practice law. In response, Hulett drafted a bill providing that no person could be precluded from any occupation, profession, or employment, except the military, based on sex.³⁸ She submitted it to the Illinois Legislature. With the help of Ada Kepley, Myra Bradwell, and numerous other women, Hulett's bill was passed in 1872, and Alta Hulett became the first woman admitted to the Illinois state bar.³⁹ In the 1870s, other states amended their statutes

30. *Id.* at 141-42 (Bradley, J., concurring).

31. MORELLO, *supra* note 8, at 49.

32. *Id.* Just over one hundred years later, Washington & Lee School of Law became the last law school to permit women to enter their first year class; D. Kelly Weisberg, *Barred from the Bar: Women and Legal Education in the United States 1870-1890*, 28 J. LEGAL EDUC. 485, 486 (1977).

33. MORELLO, *supra* note 8, at 21.

34. Berkson, *supra* note 4, at 288.

35. *Id.*

36. Weisberg, *supra* note 32, at 485 n.2.

37. MORELLO, *supra* note 8, at 21.

38. *Id.* Act of Mar. 22, 1872, 1871 Ill. Laws 578.

39. *Id.*

by dropping the word “male.”⁴⁰

Myra Bradwell never reapplied for admission to the bar after the Illinois statute was passed. However, “in 1890, the Illinois Supreme Court on its own motion granted Bradwell a license to practice law” in the state.⁴¹ Two years later, Bradwell was admitted to practice before the U.S. Supreme Court. However, she did not practice in front of that Court.⁴²

It appears that Bradwell’s struggle is typical of what other women aspiring for the right to practice law had to endure. For example, Lavinia Goodell was admitted to practice at a local level in Wisconsin in 1874.⁴³ In 1875, one of Goodell’s cases was appealed to the Wisconsin Supreme Court. Goodell immediately applied for admission to the state bar so she could represent her client.⁴⁴ However, the Wisconsin Supreme Court denied Goodell admission.⁴⁵ The Wisconsin statute governing admission to the bar did not prohibit women nor restrict admission to males, but the words “he” and “his” were used referring to applicants.⁴⁶ Goodell unsuccessfully argued that the Wisconsin statute which allowed the masculine gender in statutes to be extended and applied to females, applied to the statute governing admission to the practice of law.⁴⁷ In denying Goodell’s admission, Chief Justice Edward Ryan ruled that to say the masculine pronoun includes women would be “judicial revolution” not “judicial construction.”⁴⁸ Chief Justice Ryan stated in his opinion:

Nature has tempered women as little for the juridical conflicts of the court room, as for the physical conflicts of the battle field. Womanhood is moulded for gentler and better things. And it is not the saints of the world who chiefly give employment to our profession. It has essentially and habitually to do with all that is selfish and malicious, knavish and criminal, coarse and brutal, repulsive and obscene in human life. It would be revolting to all female sense of the innocence and sanctity of their sex, shocking to man’s reverence for womanhood and faith in woman, on which hinge all the better affections and humanities of life, that woman should be permitted to mix professionally in all the nastiness of the world which finds its way into courts of justice⁴⁹

The radical nature of Justice Ryan’s opinion brought a swift reaction from the press. The *Wisconsin State Journal* wrote, “[i]f her purity is in danger, it would

40. Weisberg, *supra* note 32, at 486-87; MORELLO, *supra* note 8, at 21-22.

41. MORELLO, *supra* note 8, at 21.

42. *Id.*

43. *Id.* at 22.

44. *Id.* at 23.

45. *In re Goodell*, 39 Wis. 232 (1875); MORELLO, *supra* note 8, at 23-25.

46. Act of Apr. 10, 1861, ch. 189, § 5, 1861 Wis. Laws 218, 219; *Goodell*, 39 Wis. at 233.

47. *Goodell*, 39 Wis. at 233.

48. *Id.* at 242.

49. *Id.* at 245-46.

be better to reconstruct the court and bar than to exclude women.”⁵⁰ On March 8, 1877, through Goodell’s efforts, the legislature revised the Wisconsin statute by adding the following: “[N]o person shall be denied a license [to practice as an attorney in any court of this state] on account of sex.”⁵¹ After the bill passed, Goodell again petitioned for admission, and on June 18, 1879, she was admitted to the Wisconsin bar.⁵² Justice Ryan dissented from her admission.⁵³

Lemma Barkaloo was one of the nation’s first woman law students, and she was Missouri’s first woman lawyer after being admitted to the bar in March 1870.⁵⁴ Barkaloo had struggled to become a lawyer. Barkaloo desired admission to both Columbia and Harvard Law Schools.⁵⁵ At the time she was denied admission to Columbia, in 1868, an entry in Columbia’s George Templeton Strong’s diary reflected the attitude of the day. It read: “No woman shall degrade herself by practicing law in New York especially if I can save her. . . . ‘Women’s Rights Women’ are uncommonly loud and offensive of late. I loathe the lot.”⁵⁶ Although she was not a Midwesterner, Barkaloo abandoned a career in music in her home state of New York and moved to Missouri to attend law school at Washington University in St. Louis.⁵⁷

Charlotte E. Ray was the first woman admitted to the District of Columbia bar.⁵⁸ Ray was a graduate of Howard University School of Law.⁵⁹ It is said that Howard University initially resisted the admission of a woman to its law classes and that Ray gained entry “by a clever ruse.”⁶⁰

At the time of her admission to the law school, Ray was an instructor in the Normal and Preparatory Department of Howard University and sent in her application as C.E. Ray.⁶¹ It was not until after her admission that Howard University discovered that Ray was a woman.⁶² Ray was a legal scholar, as reflected by the 1870 annual report of the university president where he reported that a trustee of the law school was amazed to find “there was a colored woman who read us a thesis on corporations, not copied from books but from her brain, a clear incisive analysis of one of the most delicate legal questions.”⁶³ With her 1872 admission to the District of Columbia bar, Ray became not only the first

50. MORELLO, *supra* note 8, at 25 (quoting THE WISC. ST. J., Feb. 17, 1876).

51. Act of Mar. 8, 1877, ch. 300, sec. 1, § 5, 1877 Wis. Laws 616, 616 (amending Act of Apr. 10, 1861, ch. 189, § 5); MORELLO, *supra* note 8, at 26.

52. *Id.*

53. *Id.*

54. *Id.* at 44.

55. *Id.*

56. *Id.* at 44-45, 76 (quoting George T. Strong, Diary).

57. *Id.* at 44.

58. *Id.* at 146.

59. *Id.*

60. *Id.* at 145.

61. *Id.* at 145-46.

62. *Id.*

63. *Id.* at 146.

woman lawyer in the District of Columbia, but also the first African-American woman lawyer in the United States.⁶⁴

B. The Federal Experience

Women's slow and tedious admission to the practice of law in various state courts was paralleled by women's struggles for admission to practice law in the federal courts. Belva Lockwood was one of the women who sought admission to practice in the federal courts in the 1870s.⁶⁵ Lockwood had struggled at every step of her legal career. In 1869, Lockwood tried unsuccessfully to be admitted to both Georgetown and Howard law schools.⁶⁶ Lockwood was also denied admission to the Law Department of Columbia College in Washington, D.C. in 1869, because her presence "would be likely to distract the attention of the young men."⁶⁷ Lockwood was nearly forty years old when she received this refusal and called the excuse "ridiculous."⁶⁸

Finally, the newly formed National University School of Law, later George Washington University National Law Center, admitted Lockwood where she completed the course in 1873.⁶⁹ However, the law school would not give her a diploma because the male students threatened to boycott any graduation exercises that required them to share the stage with a woman.⁷⁰ Lockwood wrote to President Ulysses S. Grant, also President of the law school, saying: "If you are [the law school's] president . . . I have passed through the curriculum of study in this school . . . and demand my diploma. If you are not its President, then I ask that you take your name from its papers, and not hold out to the world to be what you are not."⁷¹ She received no reply, but a few days later her degree was awarded.⁷²

In 1873, after building a legal practice in the Washington, D.C. area, Lockwood was refused the right to plead a case before the U.S. Court of Claims;⁷³ in 1876, Lockwood was also denied admission to the U.S. Supreme Court.⁷⁴

The federal statute then in existence providing for admission to the U.S. Supreme Court was gender neutral. However, Chief Justice Morrison Waite, upon denying Lockwood's admission to the Court, stated that as a matter of custom the rule granted "none but men" the privilege of practice.⁷⁵ After her denial,

64. *Id.* at 146-47.

65. *Id.* at 71.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 72.

72. *Id.*

73. *Id.* at 31-33; *In re Lockwood*, 9 Ct. Cl. 346 (1873).

74. MORELLO, *supra* note 8, at 33.

75. *In re Robinson*, 131 Mass. 376, 383 (1881) (quoting *In re Lockwood* (U.S. 1876) (unreported order denying Lockwood's admission to practice before the Supreme Court)).

Lockwood led a fight for passage of a federal statute that would prevent the exclusion of women from practice before the U.S. Supreme Court.⁷⁶ In 1879, the act was passed.⁷⁷ The act enabled women to practice before the U.S. Supreme Court only if they had been members of the bar of the highest court of a state or territory, or of the Supreme Court of the District of Columbia, for at least three years.⁷⁸

Finally, in March of 1879, Lockwood became the first woman admitted to practice before the U.S. Supreme Court.⁷⁹ Lockwood continued her activism in the political arena. In 1884 and 1888, Lockwood was a candidate for President of the United States on the Equal Rights ticket.⁸⁰

The activism of women like Morris, Mansfield, Bradwell, Kipley, Hulett, Goodell, Barkaloo, Ray, and Lockwood, illustrates the hurdles for women who aspired to be lawyers in our early history. These pioneer lawyers' determination was aptly expressed by Belva Lockwood when she said, "I never stopped fighting. My cause was the cause of thousands of women."⁸¹ Despite the problems encountered, by 1880 approximately twelve states and the District of Columbia had admitted women to the bar.⁸² When Belva Lockwood died in 1917, all but four states allowed women to practice law.⁸³

C. *Personal Lives*

The women discussed herein were representative of the many women lawyers in this period and later. Many of the women, both married and single, had influential male relatives who were lawyers. These women sought admission to the bar with the support of their families. Lawyer brothers, fathers, or husbands gave many of the women the opportunity to learn the law. By 1890, one-third of the 135 women lawyers in the United States were married women, of which more than one-half were married to lawyers.⁸⁴ That same year, there were twenty husband and wife law partnerships in the United States.⁸⁵

76. MORELLO, *supra* note 8, at 34.

77. *Id.* at 35; Act of Feb. 15, 1879, ch. 81, 20 Stat. 292 (codified as amended at 28 U.S.C. § 353 (1946) (repealed 1948)).

78. MORELLO, *supra* note 8, at 35.

79. *Id.*

80. *Id.* at 36-37.

81. *Id.* at 38.

82. Berkson, *supra* note 4, at 290. Those states and the year they, and the District of Columbia, first admitted women to the bar are as follows: Iowa (1869); Illinois (1870); Michigan (1871); Missouri (1871); District of Columbia (1872); Utah (1872); Maine (1872); Ohio (1873); Indiana (1875); Wisconsin (1875); Minnesota (1877); California (1878); and North Carolina (1878). MORELLO, *supra* note 8, at 37-38.

83. MORELLO, *supra* note 8, at 38. The four states, and the year they first admitted women to the bar are as follows: Arkansas (1918); South Carolina (1918); Rhode Island (1920); and Delaware (1923).

84. Weisberg, *supra* note 32, at 494-95.

85. *Id.* at 495.

Although Myra Bradwell never practiced law, she sought admission to assist her judge husband.⁸⁶ Her daughter, Bessie Bradwell Helmer, became an attorney and practiced with her attorney husband, Frank Helmer.⁸⁷ Kate Pier and her mother, Mrs. C.K. Pier, both graduated from Wisconsin Law School in 1887 and joined Mr. Pier in a law partnership.⁸⁸ Also, Arabelle Babb Mansfield's brother was an attorney.⁸⁹

The usual nature of the practice for these women lawyers was solely office work; however, a handful of women did trial work.⁹⁰ Approximately one-fifth of the women attorneys that can be identified between 1870 and 1890 never practiced law at all.⁹¹

The women used their law degrees in different ways.⁹² For example, Arabelle Babb Mansfield, the first woman lawyer in the United States, was twenty-three in June of 1869 when she faced a committee of law examiners and was admitted to the Iowa bar.⁹³ Prior to her admission, Mansfield had served a law apprenticeship in her brother's law firm, Ambler & Babb.⁹⁴ In 1868, Mansfield married Iowa Wesleyan College professor John Mansfield, who encouraged her legal studies and efforts for women's suffrage.⁹⁵ After her admission, Arabelle Babb Mansfield never practiced law.⁹⁶ Instead, while traveling with her husband in Europe, Mansfield continued her legal studies; upon her return to the United States, she joined the Iowa Wesleyan faculty.⁹⁷ In 1881, Mansfield and her husband accepted faculty positions at DePauw University in Greencastle, Indiana, where she retired as Dean of the DePauw School of Music and Art.⁹⁸ Mansfield died in 1911.⁹⁹

Many women were active in different social movements and politics, with a few being ardent suffragettes.¹⁰⁰ In 1910, the U.S. Census Bureau reported a total of 122,149 lawyers and judges in the United States of whom women numbered 1343 (approximately 1% of the total).¹⁰¹ By 1963, the number of lawyers had

86. *Id.* at 496.

87. *Id.*

88. *Id.*

89. *Id.* at 494-95; MORELLO, *supra* note 8, at 11.

90. Weisberg, *supra* note 32, at 496.

91. *Id.* at 498.

92. *Id.*

93. MORELLO, *supra* note 8, at 11.

94. *Id.* at 11-12.

95. *Id.* at 12.

96. *Id.* at 13.

97. *Id.*

98. *Id.* at 13-14.

99. *Id.* at 14.

100. Weisberg, *supra* note 32, at 501.

101. 4 U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, THIRTEENTH CENSUS OF THE UNITED STATES 54 (1914); Berkson, *supra* note 4, at 289 (citing GRIFFIN, EMPLOYMENT OPPORTUNITIES FOR WOMEN IN LEGAL WORK 2 (1958)).

risen to 296,069, with 2.7% of them women.¹⁰² The percentage of women lawyers had increased to approximately 13% by 1980, representing nearly 59,000 women who had been admitted to the practice of law in the United States.¹⁰³ In 1991, 20% of all lawyers were women.¹⁰⁴ However, in 1991, of all practicing lawyers, those admitted prior to 1975 made up 44% of the lawyer population, and only 5% of the admittees prior to 1975 were women.¹⁰⁵

II. THE GENESIS OF WOMEN IN THE LEGAL PROFESSION IN INDIANA

While women were entering the legal profession throughout the nation, women were not sitting still in Indiana. In 1893, Antoinette Dakin Leach, heralded as Indiana's first woman lawyer, was admitted to the practice of law in Indiana by order of the supreme court.¹⁰⁶ However, the records reflect that at least two women, and perhaps more, preceded Leach into the practice of law as a result of admission by lesser courts.¹⁰⁷ At that time, admissions to the bar were made by individual circuit courts throughout the state.¹⁰⁸ Each person wishing to be admitted to the practice in a particular county had to petition the circuit court judge in that county.¹⁰⁹ Judges were not uniform in their interpretations of the constitutional provisions on bar admissions.¹¹⁰ Thus, women were admitted in some counties and not in others.¹¹¹

In the 1890s, Indiana had no central registry of Indiana lawyers.¹¹² It is therefore difficult to ascertain the exact number of women admitted into some level of practice. However, Order Book Number 24 of the Vigo Circuit Court shows that on September 8, 1875, Attorney William Mock moved the court to admit Bessie Eaglesfield to practice law in all of the courts of justice.¹¹³ The

102. Berkson, *supra* note 4, at 289 (citing James J. White, *Women in the Law*, 65 MICH. L. REV. 1051 (1967)) (White agrees that 2.7% of the total are women, but places the total number of lawyers at 268,782 as of 1963.); BARBARA A. CURRAN ET AL., *THE LAWYER STATISTICAL REPORT: A STATISTICAL PROFILE OF THE U.S. LEGAL PROFESSION IN THE 1980S 1-9* (1985).

103. Berkson, *supra* note 4, at 289 (citing U.S. BUREAU OF LABOR STATISTICS, DEP'T. OF LABOR, MONTHLY REPORT, EMPLOYMENT AND EARNINGS 180 (1981)).

104. BARBARA A. CURRAN, A.B.A., *WOMEN IN THE LAW: A LOOK AT THE NUMBERS 8* (1995).

105. Barbara A. Curran & Clara N. Carson, *The U.S. Legal Profession in the 1990s*, *THE LAWYER STATISTICAL REPORT* (1994).

106. James E. Farmer, *Indiana's First Woman Lawyer: The Historical Evidence*, 37 RES GESTAE 109, 109 (1993) [hereinafter *Indiana's First Woman Lawyer*].

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* In stating her qualifications to be admitted, Eaglesfield falsely alleged that she was a voter. She evidently felt this allegation was essential because article VII, section 21 of the Indiana Constitution required an admittee to be a voter. However, it would have been impossible for

motion was granted, and Eaglesfield was admitted to the bar. History reflects that Eaglesfield graduated in 1877 from the University of Michigan School of Law,¹¹⁴ so she was apparently admitted to the Indiana bar prior to completion of law school.

Other claims were made to being the first woman lawyer in Indiana. Civil Order Book Number 28 of the Hendricks Circuit Court reflects that on January 26, 1886, CeDora Lieuellen was admitted to practice on the motion of Attorney Muratt W. Hopkins.¹¹⁵ Unlike Eaglesfield, who practiced for a time in Terre Haute and Indianapolis, as well as Grand Rapids, Michigan, Lieuellen apparently never practiced law.¹¹⁶

A claim has been made that Stella Colby Meeker of Crown Point, Indiana, admitted in 1893, was Indiana's first woman lawyer.¹¹⁷ Lafayette boasts of Helen M. Gougar, a suffragette who appeared before the Indiana Supreme Court acting as her own attorney after being barred from casting a ballot in the 1894 general election.¹¹⁸ Gougar's bar admission was on January 10, 1895, the same day she stood in Tippecanoe Superior Court to challenge the denial of her right to vote.¹¹⁹

Finally, Wendell L. Willkie, a 1940 presidential candidate, contended that his mother, Henrietta Trisch Willkie of Elwood, Indiana, was the first woman lawyer in Indiana.¹²⁰ But the *Anderson Bulletin* stated that Mrs. Willkie took her oath on July 11, 1897, which is much later than when Eaglesfield, Lieuellen, or even Leach took their oaths.¹²¹ In her admission to the bar, Mrs. Willkie was strongly opposed by an attorney, J.E. Beeler.¹²² They both had written statements published in the *Anderson Bulletin*.¹²³ Attorney Beeler argued, "I am not opposed to women practicing law because I am prejudiced against their happiness, but because I am their friend."¹²⁴ Beeler continued, "The happiest women we see are those who learn to love their homes away from the worries and strifes of this life, with their families gathered about them, teaching them to become good citizens in this life, and directing their erring steps for the life to come."¹²⁵

Henrietta Willkie wrote, "My efforts in seeking admission to the Madison County Bar and to practice in the Indiana courts are not prompted by a desire to make a livelihood or money for myself, but to lend what aid I may to remove the

Eaglesfield to be a voter because women were not allowed to vote at that time.

114. *Id.*

115. *Id.* at 110.

116. *Id.*

117. *Id.*

118. *Id.* at 111.

119. Women in the Law Banquet, Program at the Indiana State Bar Association 97th Annual Meeting, (October 28, 1993).

120. *Indiana's First Woman Lawyer*, *supra* note 106, at 110.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 110-11.

popular prejudice against women entering all honorable professions with men, and letting ability, and not sex, mark the distinction of attainments.”¹²⁶ Mrs. Willkie noted that a charge had been made that such a move would interfere with the “sanctity of the home,” and said, “It is to refute this charge against our sex that has especially urged me onward in my ambitions and to give those theorists an example of its falsity.”¹²⁷

Prior to her admission, Henrietta Willkie worked in the law office of her husband, Herman F. Willkie, and apparently continued to do so after her admission to the bar.¹²⁸ The Willkies had five children at the time, one of whom was Wendell.¹²⁹

Despite these contradictory claims of firsts, it was clearly Antoinette Dakin Leach whose 1893 appeal to the Indiana Supreme Court firmly and finally granted all Indiana women the right to be admitted to the practice of law.¹³⁰ Leach had asked the circuit judge in the Greene/Sullivan Circuit Court for admission to practice law.¹³¹ The judge rejected Leach’s petition.¹³² However, records preserved in the Indiana State archives indicate that the judge may have been deliberately setting the stage for a test of the state constitutional provision that, “[e]very person of good moral character, being a voter, shall be entitled to admission to practice law in all courts of Justice.”¹³³

Antoinette Dakin Leach was born in Ohio in 1859. When she was fourteen years old she graduated from the Ascension Seminary in Sullivan, Indiana. Leach taught school for four years before enrolling at Ohio Wesleyan University in Delaware, Ohio.¹³⁴ In 1879, at the age of twenty, Leach returned to Indiana to marry George W. Leach, a Sullivan businessman.¹³⁵ Leach may have been one of Indiana’s first proponents of antenuptial contracts. Prior to her marriage, Leach made a prenuptial agreement with George that allowed her to pursue a profession.¹³⁶

In the first five years of her marriage, Leach gave birth to a son and a daughter and explored career possibilities.¹³⁷ Leach trained as a stenographer, shorthand writer, and court reporter in Sullivan and Greene County and introduced both stenography and shorthand to the local community.¹³⁸ Leach became well-known

126. *Id.* at 111.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 109.

131. James E. Farmer, *Women in the Law: A Centennial Legacy of Antionette Dakin Leach*, 37 RES GESTAE 106, 106 (1993).

132. *Id.*

133. *Id.*; IND. CONST. art. VII, § 21 (repealed 1932).

134. Farmer, *supra* note 131, at 109.

135. *Id.* at 108.

136. *Id.* at 108-09.

137. *Id.* at 109.

138. *Id.*

as a teacher and advocate of modern stenography.¹³⁹

In 1884, Leach enrolled in law school in Knoxville, Tennessee and received her degree the same year.¹⁴⁰ She continued her legal studies in Detroit.¹⁴¹ In 1888, Leach returned to Sullivan where she worked in the law office of John S. Bays.¹⁴² While working for Bays, Leach continued to serve as a court reporter in the local circuit court and was active in the suffrage movement.¹⁴³ In 1893, when she applied for admission to the Greene County bar, Leach was well-known to the local bar, who supported her petition to Judge John C. Briggs, for whom she had worked as a court reporter, and to the community at large, because of her work in the suffrage movement.¹⁴⁴ On February 14, 1893, John Bays, Leach's attorney, associate, employer, and friend, petitioned the Greene Circuit Court for her admission to the practice of law.¹⁴⁵ The petition asserted that Leach was a woman over the age of twenty-one, a resident of Sullivan, Indiana, for more than fifteen years, and possessed both good moral character and a thorough knowledge of the law.¹⁴⁶ The petition further stated that Leach was willing to be examined by the judge or any committee of the bar selected by the judge.¹⁴⁷

At that time, Indiana had both a constitutional provision and a statute addressing the admission of attorneys. Article VII, section 21 of the 1851 Indiana Constitution provided that: "Every person of good moral character, being a voter, shall be entitled to admission to practice law in all courts of justice."¹⁴⁸

The Indiana General Assembly had also adopted a statute that tracked the constitutional provision but added:

[A]nd any person desiring admission to the bar, may, upon motion, be examined touching his learning in the law, by the Judge, or a committee of the bar whom the Judge may select for that purpose. If he shall be found, by reason of his learning, qualified to practice the law, as well as otherwise qualified, he shall be admitted to the practice. . . . A roll of attorneys shall be kept in every Court, and no name shall be placed thereon except such as are thus shown to be qualified to practice law by reason of their learning therein.¹⁴⁹

In denying Leach's petition, Judge Briggs made special findings that she possessed a good moral character and was learned in the law.¹⁵⁰ Women did not

139. *Id.*

140. *Id.* at 106.

141. *Id.* at 109.

142. *Id.*

143. *Id.*

144. *Id.* at 106-09.

145. *Id.* at 106.

146. Brief for Petitioner at 3, *In re Leach*, 34 N.E. 641 (Ind. 1893) (No. 16972).

147. *Id.* at 3-4.

148. IND. CONST. art. VII, § 21 (repealed 1932).

149. Act of Apr. 7, 1881, ch. 38, § 831, 1881 Ind. Acts 240, 383 (superseded 1932).

150. Farmer, *supra* note 131, at 106.

have the right to vote at that time, so Judge Briggs concluded that Antoinette Leach, not being a voter, is not entitled to be admitted to practice law at the bar on the Greene Circuit Court.¹⁵¹ The denial of Leach's admission was clearly based on the constitutional provision requiring that the admittee be a voter.

Thus, the circuit court set the stage for Leach's appeal to decide the issue of whether an applicant's gender, which denied her the right to vote, was sufficient to bar her from the legal profession. Leach's appellate brief was among the very first typewritten briefs to be submitted to the Indiana Supreme Court.¹⁵² In her brief, Leach argued that the generosity of the constitution in admitting voters to the practice of law only expanded the opportunity to a class not heretofore recognized and did not limit admission to those who were voters.¹⁵³ Leach argued that the constitution should be construed to enlarge the class of people eligible, not to shrink the eligible class.¹⁵⁴

Leach also argued that there was no intent, either in the constitution or the statute, to exclude women from the practice of law on account of their sex and stated that "[w]e are not to forget that all statutes are to be construed, as far as possible, in favor of equality of rights."¹⁵⁵ Leach noted that the U.S. Supreme Court and other state courts had held that the term "person" included an Indian,¹⁵⁶ persons of both sexes,¹⁵⁷ and married as well as single women.¹⁵⁸ Thus, she insisted that the word "'persons' must be used in its general sense . . . and not in a limited sense."¹⁵⁹

Finally, Antoinette Dakin Leach wrote: "We are living in an age of advancement. Bigotry and prejudice [sic] are giving way before the enlightened thought of better ages and less barbarous times, and many harsh and unreasonable rules have fallen before the spirit of enlightened reason and true progress."¹⁶⁰ Leach argued that in her case "there is neither law, reason, nor excuse, for holding that a *person* who is, in the language of the special finding, of 'sufficient knowledge of the law to qualify her to be admitted to practice law in the Courts of the State of Indiana and the Greene Circuit Court and is sufficiently qualified to so practice law in the Courts of said State,' is disqualified under our Constitution. . . ."¹⁶¹

Because the circuit court had specifically found Leach to be learned in the law, she contended that to deny her admission would violate the common law, which

151. *Leach*, 34 N.E. at 641. Farmer, *supra* note 131, at 106.

152. Farmer, *supra* note 131, at 110.

153. Brief for Petitioner at 9, *In re Leach*, 34 N.E. 641 (Ind. 1893) (No. 16972).

154. *Id.*

155. *Id.* at 6.

156. *Id.* at 11 (citing *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695, 697 (C.C.D. Neb. 1879) (No. 14,891)).

157. *Id.* (citing *Brown v. Hemphill*, 74 Ga. 795 (1885)).

158. *Id.* (citing *Benny v. Globe Nat'l Bank*, 150 Mass. 581 (1890)).

159. *Id.* (citing *In re Hall*, 50 Conn. 131 (1882)).

160. *Id.* at 13 (citing *Haynes v. Nowlin*, 29 N.E. 389 (1891)).

161. *Id.* at 14 (emphasis added).

required only that a person be learned. In her brief, Leach further contended:

This would seem strange indeed that the applicant, who is a person of culture and learning, who would bring into the profession knowledge, scholarship and enlightenment, is to be relegated to the rear, to make way for some clever clown, for the reason that he can exercise the right of elective franchise, though he be uneducated and untutored.¹⁶²

Leach's appeal was heard by the five justices of the Indiana Supreme Court. Justice Leonard J. Hackney, a thirty-eight-year-old man who had joined the court only four months before, became responsible for the majority decision.¹⁶³ Justice Hackney was a Democrat from Shelbyville, Indiana, who in November 1892, had been elected to the Indiana Supreme Court after four years as the Shelby Circuit Court Judge.¹⁶⁴ Justice Hackney wrote quite simply and eloquently when he rendered the court's decision on June 14, 1893. Justice Hackney reversed the circuit court, stating that "[w]hile voters, of good moral character, are granted admission, upon application and proper evidence, there is no denial of such right to women."¹⁶⁵ He termed as "fictions" ancient customs relegating women to the domestic scene, and said, "If nature has endowed woman with wisdom, if our colleges have given her education, if her energy and diligence have led her to knowledge of the law, and if her ambition directs her to adopt the profession, shall it be said that forgotten fictions must bar the door against her?"¹⁶⁶ He decided that to enforce rules of common law for the exclusion of women would abridge their privileges as citizens.¹⁶⁷

Examining the common law, Justice Hackney found that it was by the "customs and usages of Westminster Hall," and not by explicit pronouncement, that women were excluded from the legal profession.¹⁶⁸ Describing the "custom and usage" as "incident to the prevailing order of society—that to the domestic sphere, *only*, did the functions of womanhood belong [...] . . . [Judge Hackney concluded that] [s]uch of these fictions as became a part of the law of this country are rapidly disappearing, and few if any of them exist in Indiana."¹⁶⁹

In referring to the common law, Justice Hackney found that

[w]hatever the objections of the common law of England, there is a law higher in this country, and better suited to the rights and liberties of American citizens,—that law which accords to every citizen the natural right to gain a livelihood by intelligence, honesty, and industry in the arts, the science, the professions, or other vocations. This right . . . must be

162. *Id.* at 9.

163. Farmer, *supra* note 131, at 107.

164. *Id.*

165. *Leach*, 34 N.E. at 641.

166. *Id.*

167. Farmer, *supra* note 131, at 107 (citing *Leach*, 34 N.E. at 642-43).

168. *Leach*, 34 N.E. at 641-42.

169. *Id.* (emphasis added).

held to exist as long as not forbidden by law.¹⁷⁰

Thus, the Indiana Supreme Court held that women could practice law because they were not expressly forbidden from doing so by state law or by the constitution, because as citizens they had the privilege of choosing a profession, because society had progressed to such a state to make such choices acceptable, and because they now wanted to enter the profession.¹⁷¹ That women wanted to enter the practice of law was not in question; a Petition for Immediate Decision was filed by W.H. Latta in the *Leach* case stating that “two young ladies, who will receive their diplomas” from DePauw School of Law on June 14, 1893, desire to practice law.¹⁷²

This decision was certainly more enlightened than that of the Illinois Supreme Court which denied Myra Bradwell’s petition to practice law in the State of Illinois with rhetoric such as: “That God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply, and execute the laws, was regarded as an almost axiomatic truth.”¹⁷³ Indeed, the U.S. Supreme Court, in affirming the *Bradwell* decision of the Illinois Supreme Court joined in the rhetoric, observing: “The paramount destiny and mission of woman [sic] are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of the civil society must be adapted to the general constitution of things. . . .”¹⁷⁴

The *Leach* decision was not relished by many among the 2450 lawyers then in the State of Indiana.¹⁷⁵ An Indianapolis attorney wrote in *The Bench and Bar of Indiana* in 1895 that the decision “has not been accepted by the Bar.”¹⁷⁶ Because “only voters” could be admitted, he claimed, “no one seriously thought that a woman could be admitted.”¹⁷⁷ He added, “[t]here was no prejudice against her admission, but simply an understanding that it was impossible.”¹⁷⁸ A 1900 report of the fledgling Indiana State Bar Association quoted a former Attorney General as referring to such cases as “petticoat decisions.”¹⁷⁹

Antoinette Dakin Leach was sworn in as a member of her county bar on October 10, 1893, and she was finally able to appear in court.¹⁸⁰ Leach maintained a general practice, including criminal defense, for twenty-four years.¹⁸¹ By 1896, Leach had her own office in “her elegant home on West Washington Street in Sullivan,” where it was said that she “gathered together one of the finest working

170. *Id.* at 641-42.

171. *Id.* at 642.

172. Petition for Immediate Decision at 1, *In re Leach*, 34 N.E. 641 (Ind. 1893) (No. 16972).

173. *In re Bradwell*, 55 Ill. 535, 539 (1869), *aff'd*, 83 U.S. 130 (1872).

174. *Bradwell v. Illinois*, 83 U.S. 130, 141-42 (1872).

175. Farmer, *supra* note 131, at 107.

176. *Id.* at 107-08.

177. *Id.* at 108.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

law libraries in Sullivan" [and] "knew how to find therein the decisions which supported her theory of a case."¹⁸²

Although in 1893, Antoinette Dakin Leach's successful appeal guaranteed the rights of all qualified Indiana women to be admitted to the practice of law, Indiana dates the admission of its first woman lawyer from 1875 in the person of Miss Elizabeth (Bessie) Eaglesfield.¹⁸³ Only seven states and the District of Columbia had admitted women to practice law prior to the admission of Indiana's first lawyer. Those women and states were: Ada H. Kepley (Illinois 1870); L.M. Barkaloo (Missouri 1870); Sarah Kilgore (Michigan 1871); Charlotte E. Ray (District of Columbia 1872); Clara H. Nash (Maine 1872); Phoebe W. Couzens (Utah 1872); Nettie C. Lutes (Ohio 1873); and Elsie B. Botensek (Wisconsin 1875).¹⁸⁴

III. THE GENESIS OF WOMEN IN THE JUDICIARY IN THE UNITED STATES

Women had three formidable obstacles in breaking a path to the judiciary. They had to be educated in the law, politically powerful and experienced attorneys.¹⁸⁵ Winning admission to law schools was just the beginning of the struggle to claim benches in the United States. In fact, the first woman to serve as a judge was not legally trained, but was a milliner. She was Esther McQuigg Morris.¹⁸⁶ Prior to her appointment, "Morris had been instrumental in drafting and gaining passage of the 1869 Women's Suffrage Bill, which made Wyoming women the first in the world to win equal suffrage."¹⁸⁷ When the bill was signed into law, P.S. Barr, the presiding justice of the peace, resigned in protest, sarcastically suggesting a woman might better fill the office.¹⁸⁸ The County Commissioners took him at his word and appointed Esther Morris.¹⁸⁹

In 1886, Carrie Burnham Kilgore, another ardent suffragette, was named a master of chancery in Philadelphia, becoming one of the first women to serve in a state judiciary.¹⁹⁰ Kilgore was also the first woman to graduate from the University of Pennsylvania Law School and the first woman in New York State to earn a medical degree.¹⁹¹ Other women slowly were appointed to the bench and joined the ranks of women jurists.

It was not until 1921, however, that a woman was elected, rather than appointed, to a judicial position.¹⁹² Florence Ellinwood Allen was elected as

182. *Id.* at 108-10.

183. *Indiana's First Woman Lawyer*, *supra* note 106, at 109.

184. Berkson, *supra* note 4, at 290.

185. See Beverly B. Cook, *The Path to the Bench: Ambitions and Attitudes of Women in the Law*, TRIAL, Aug. 1983, at 48, 48.

186. MORELLO, *supra* note 8, at 219.

187. *Id.*

188. *Id.*

189. *Id.* at 219-20.

190. *Id.* at 223.

191. *Id.*

192. *Id.* at 233.

Judge of the Court of Common Pleas in Cuyahoga County, Ohio.¹⁹³ Prior to studying law at the University of Chicago Law School, Florence Allen was an accomplished pianist and worked as a music critic and teacher.¹⁹⁴ Allen was the only woman in her law class; when she excelled, her fellow law students attributed her success to having an unnaturally "masculine mind."¹⁹⁵ Allen transferred to New York University and, in 1913, graduated second in her class.¹⁹⁶

Allen was unable to get a job with any law firm in Ohio, so she set up her own law practice.¹⁹⁷ Five years later she was offered a job as Assistant Cuyahoga County Prosecutor.¹⁹⁸ In 1920, Florence Allen successfully campaigned for a trial judgeship in Cleveland on the basis of an equal right to and competence for office.¹⁹⁹ Allen's election came only ten weeks after women were given the right to vote.²⁰⁰ She refused to accept a special assignment to domestic relation cases, which her brethren thought appropriate for her gender.²⁰¹

Allen became the first woman judge in the United States to sentence a defendant to death.²⁰² In the following year, she became the first woman elected as a state supreme court justice.²⁰³ During her second term on the Ohio Supreme Court in 1934, President Franklin D. Roosevelt appointed her to the U.S. Sixth Circuit Court of Appeals, thus becoming the first woman to serve on the U.S. Court of Appeals.²⁰⁴ Allen remained the only woman on a federal court of appeals for thirty-two years.

"The first woman to serve on a state intermediate appellate court was Annette Adams."²⁰⁵ In 1942, Adams was appointed to the Third District Court of Appeals in Sacramento, California.²⁰⁶

Forty-three years after Florence Allen's election to a state supreme court, a woman was first selected as chief justice of a state supreme court. Lorna Lockwood had served on the Maricopa County Superior Court from 1951 to 1960 and served on the Arizona Supreme Court for four years before assuming its leadership in 1965.²⁰⁷ Lockwood's father, the Honorable Alfred Collins Lockwood, had served on the Arizona Supreme Court from 1925 to 1942,

193. *Id.* at 232.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* at 232-33.

200. *Id.* at 233.

201. *Id.*

202. *Id.*

203. *Id.* at 234.

204. *Id.*

205. Berkson, *supra* note 4, at 292.

206. *Id.*; Beverly B. Cook, *Women Judges: The End of Tokenism*, in *WOMEN IN THE COURTS* 84, 86 (Winifred L. Hepperle & Laura Crites eds., 1978).

207. *Spirit of 1976*, 62 *WOMEN LAW. J.* 136, 138 (1976); MORELLO, *supra* note 8, at 240.

including six years as chief justice.

Ten years after Justice Lorna Lockwood's selection as chief justice, the second woman chief justice was named. In 1975, Susie Marshall Sharp became the Chief Justice of the North Carolina Supreme Court.²⁰⁸ Sharp was North Carolina's first woman judge.²⁰⁹ Before her appointment, she had served as a superior court judge for thirteen years.²¹⁰

The first woman to serve on a U.S. District Court was Burnita Shelton Matthews.²¹¹ Matthews was appointed by President Truman in 1949 to the U.S. District Court for the District of Columbia.²¹² At the time of Matthews' appointment, Harvard Law School had just begun accepting women applicants.²¹³ The blanket acceptance was, however, restricted by Dean Erwin Griswold when he announced that because many able men were turned away each year, Harvard would expect to admit "only a small number of unusually qualified women."²¹⁴

Judge Matthews, in writing "an article on women and the law for the October 11, 1950, *Harvard Law School Record* . . .," mentioned that it had been suggested that she had taken a judicial position that rightfully belonged to a man.²¹⁵ She said:

As Congress had created more than 20 new federal judgeships and only one had gone to a woman, the story was recalled of the little boy and little girl who were in a swing that was large enough for only one. The little boy said to the little girl, "If one of us would get out of this swing there would be room enough for me."²¹⁶

Judge Matthews was the only woman judge at a federal district court level for twelve years.²¹⁷ Another ardent suffragette, Judge Matthews obtained a law degree in 1919 and a master's degree in patent law in 1920.²¹⁸ While still in law school, Matthews picketed the White House in a women's suffrage demonstration.²¹⁹ In her private practice, Matthews had many feminist clients, including Ruby Black. With Black's case, Matthews created a precedent that a woman "who has not changed her name upon marriage need not assume her husband's name to obtain a passport."²²⁰ Matthews also drafted several pieces of legislation including: the statute removing the disqualifications of women as jurors in Washington, D.C.; the

208. MORELLO, *supra* note 8, at 241.

209. *Id.* at 242.

210. *Id.*

211. *Id.* at 238.

212. *Id.*

213. *Id.* at 101-02.

214. *Id.* at 101.

215. *Id.* at 102.

216. *Id.* (quoting Burnita S. Matthews, *HARVARD LAW SCHOOL RECORD*, Oct. 11, 1950).

217. *Id.* at 238.

218. *Id.*

219. *Id.*

220. *Id.*

Arkansas and New York statutes eliminating preference for males over females in inheritance; Maryland and New Jersey acts giving women teachers equal pay with men teachers; the South Carolina law allowing married women to sue and be sued without joining their husbands; and the 1931 and 1934 amendments to the federal statute extending citizenship rights of women.²²¹

The number of women on the bench in state courts grew at a snail's pace until the 1970s. In 1930, twelve states had women who had served in some judicial capacity.²²² By 1940, there were twenty-one, and by 1950, twenty-nine states had women in the judiciary.²²³ During the 1970s, the number of women state judges increased rapidly.²²⁴ In 1977, Professor Beverly Cook identified nine women serving on various states' high courts, eighteen on intermediate appellate courts, 130 on general jurisdiction trial courts and 317 on courts of limited and special jurisdiction.²²⁵ Twenty states had no women appellate judges, ten others had only one woman on their trial courts, and six states did not have women serving on even limited or special jurisdiction courts.²²⁶ It was not until 1979, when Montana selected a woman judge, that every state had at some time at least one woman serve in its judiciary.²²⁷ In the fall of 1980, with the appointment of a woman superior court judge in New Hampshire, every state had a woman judge serving at some level of the judiciary.²²⁸ The national percentage of women in the judiciary rose from 4% in 1980 to 9% in 1991.²²⁹

IV. THE GENESIS OF WOMEN IN THE JUDICIARY IN INDIANA

However progressive Indiana may have been in admitting women to the legal practice, it lagged far behind other states in permitting women to enter the judiciary. While seven states had admitted women to the practice of law when Indiana admitted Bessie Eaglesfield, thirty-seven states had women judges when Indiana's first woman assumed the bench.²³⁰ Ninety years after Indiana admitted its first woman lawyer, Indiana had its first woman judge.²³¹ In 1964, V. Sue Shields²³² was elected to serve as a superior court judge in Hamilton County, Indiana. Although there may have been women justices of the peace or perhaps women on courts not of record prior to Judge Shields' election, she was the first woman to assume the bench in a court of record.

221. *Id.*; see also Maurine H. Abernathy, *Women Judges in the United States Courts*, 55 WOMEN LAW. J. 57, 57-58 (1969).

222. Berkson, *supra* note 4, at 292.

223. *Id.*

224. *Id.* at 293.

225. Cook, *supra* note 206, at 88; Berkson, *supra* note 4, at 293.

226. Berkson, *supra* note 4, at 293.

227. *Id.*

228. *Id.*

229. CURRAN, *supra* note 104, at 29.

230. Berkson, *supra* note 4, at 290.

231. *Id.*

232. Questionnaires, *supra* note 2; see Shields, *infra* Appendix C.

Judge Shields was only twenty-five years-old and out of law school four years when she was elected to a newly-created superior court in Hamilton County. Shields had worked as counsel for the Internal Revenue Service and as a Deputy Attorney General. Shields had not been in the private practice of law, but had intended to open a law office with her attorney husband. At that time, attorneys could not advertise. Judge Shields expected that her candidacy would bring public attention to the law office she and her husband were to open. However, Shields was elected and began her long and distinguished judicial career.

It was not until 1975 that another woman joined Judge Shields as a member of Indiana's judiciary. Betty S. Barteau²³³ was elected in Marion County and began to serve in January of 1975 on a superior court having unlimited jurisdiction, but exercising civil and domestic jurisdiction.

Thus began the slow ascension of women to the bench in Indiana. In fifteen of the nineteen years from 1975 through 1994, a woman assumed the bench in at least one of the ninety-two counties in Indiana. The only years where no women assumed the bench were 1977, 1982, 1992, and 1994. In 1976, Linda L. Chezem²³⁴ and Judith H. Dwyer²³⁵ were appointed to county courts in Lawrence County and Daviess County, respectively. In 1978, Darlene W. Mears²³⁶ was appointed to the Lake Superior Court, Juvenile Division. Also in 1978, Judge Shields of the Hamilton Superior Court was appointed to the Indiana Court of Appeals, becoming the first woman in Indiana history to serve on an appellate court.

In 1979, Patricia L. Gifford²³⁷ was elected. Her court exercised felony jurisdiction in Marion County. Also in 1979, Antoinette A. Cordingly²³⁸ was appointed to the municipal court in Marion County. In 1980, the only woman becoming a judge in Indiana was Betty Shelton Cole.²³⁹ She was appointed to a county court in Delaware County.

In 1981, four women took the bench in Indiana, the largest number as of that date in any one year. Maryland L. Austin,²⁴⁰ Eleanor B. Stein²⁴¹ and Sally H. Gray²⁴² were elected to county courts in Harrison-Crawford Counties, Howard County and Putnam County respectively, and Jeanne Jourdan²⁴³ was appointed to a superior court in St. Joseph County.

233. Questionnaires, *supra* note 2; see Barteau, *infra*, Appendix C.

234. Questionnaires, *supra* note 2; see Chezem, *infra*, Appendix C.

235. Questionnaires, *supra* note 2; see Dwyer, *infra*, Appendix C.

236. Questionnaires, *supra* note 2; see Mears, *infra*, Appendix C.

237. Questionnaires, *supra* note 2; see Gifford, *infra*, Appendix C.

238. Information about the Honorable Antoinette Cordingly, deceased, was obtained from public records and interviews by this author (1994) (on file with author); see Cordingly, *infra*, Appendix C.

239. Questionnaires, *supra* note 2; see Cole, *infra*, Appendix C.

240. Questionnaires, *supra* note 2; see Austin, *infra*, Appendix C.

241. Questionnaires, *supra* note 2; see Stein, *infra*, Appendix C.

242. Questionnaires, *supra* note 2; see Gray, *infra*, Appendix C.

243. Questionnaires, *supra* note 2; see Jourdan, *infra*, Appendix C.

No changes were made in 1982. In 1983, five women took the bench. Clementine B. Barthold²⁴⁴ was elected to a superior court in Clark County; Mary Lee Comer²⁴⁵ was elected to a superior court in Hendricks County; Patricia A. McNagny²⁴⁶ was elected to the Whitley County Court; Kathy R. Smith²⁴⁷ was elected to the Clinton County Court, and Judith S. Proffitt²⁴⁸ was appointed to the Hamilton Circuit Court.

In 1984, two more women took the bench. Sarah Evans Barker²⁴⁹ made history by becoming the first woman to preside over a federal district court bench in Indiana, and Olga H. Stickel²⁵⁰ was appointed to the Elkhart County Court. 1984 was also the first year that a woman left the bench in Indiana. Maryland Austin was not re-elected.

In 1985, the number of women in judicial offices was increased by only one. Mary Rudasics Harper²⁵¹ was elected to the Porter County Court. In 1986, Margaret Hand's²⁵² appointment to a superior court bench in Tippecanoe County increased the ranks, making the total number of women serving on the bench in Indiana nineteen.

In 1987, great strides were made. Six women became Indiana judges. Elaine B. Elliott²⁵³ was elected to the Dubois Circuit Court; Suzanne Trautman Dugan²⁵⁴ was elected to the Bartholomew Circuit Court; Kelley Huebner²⁵⁵ was elected to the Martin Circuit Court; Phyllis Kenworthy²⁵⁶ was appointed to the Monroe Superior Court; Elizabeth Ward Hammond Swarens²⁵⁷ was elected to the Crawford Circuit Court, and Cynthia Emkes²⁵⁸ was appointed to the Johnson Superior Court. This raised the number of Indiana women judges to twenty-five, the highest number to date.

In 1988, Linda Chezem of the Lawrence Circuit Court was appointed to the Indiana Court of Appeals. More glass ceilings were shattered when Z. Mae Jimison,²⁵⁹ the first African-American woman judge in Indiana, was appointed to the Marion Superior Court. Phyllis Senegal, an African-American attorney from Lake County, had hammered on the ceiling in 1975 and 1976 when she was

244. Questionnaires, *supra* note 2; see Barthold, *infra* Appendix C.

245. Questionnaires, *supra* note 2; see Comer, *infra* Appendix C.

246. Questionnaires, *supra* note 2; see McNagny, *infra* Appendix C.

247. Questionnaires, *supra* note 2; see Smith, *infra* Appendix C.

248. Questionnaires, *supra* note 2; see Proffitt, *infra* Appendix C.

249. Questionnaires, *supra* note 2; see Barker, *infra* Appendix C.

250. Questionnaires, *supra* note 2; see Stickel, *infra* Appendix C.

251. Questionnaires, *supra* note 2; see Harper, *infra* Appendix C.

252. Questionnaires, *supra* note 2; see Hand, *infra* Appendix C.

253. Questionnaires, *supra* note 2; see Elliott, *infra* Appendix C.

254. Questionnaires, *supra* note 2; see Dugan, *infra* Appendix C.

255. Questionnaires, *supra* note 2; see Huebner, *infra* Appendix C.

256. Questionnaires, *supra* note 2; see Kenworthy, *infra* Appendix C.

257. Questionnaires, *supra* note 2; see Swarens, *infra* Appendix C.

258. Questionnaires, *supra* note 2; see Emkes, *infra* Appendix C.

259. Questionnaires, *supra* note 2; see Jimison, *infra* Appendix C.

appointed as Judge Pro Tempore to complete the term of another judge. However, Senegal never progressed beyond the pro tempore level because her name was not included when the Judicial Nominating Commission submitted three names to the governor for selection to permanent appointment.

In 1989, Barbara Arnold Harcourt²⁶⁰ was elected to the Rush Circuit Court, Elizabeth N. Mann²⁶¹ was appointed to the Monroe Circuit Court, and Eleanor Stein retired from the bench to which she had been elected in 1981. In 1990, Patricia A. Riley²⁶² was appointed to the Jasper Superior Court. Also, in 1990 Z. Mae Jimison's appointed term expired, and she was not re-elected.

In 1991, more women joined the courts than in any previous year. Nine women assumed the bench that year with two retiring, making a total of thirty-five women serving at the end of 1991. Those assuming the bench were: Cynthia J. Ayers,²⁶³ Indiana's second African-American woman judge, elected to the Marion Superior Court; Jane Spencer Craney,²⁶⁴ elected to the Morgan County Court; Susan H. Hemminger,²⁶⁵ elected to the LaPorte Superior Court; Paula E. Lopossa,²⁶⁶ elected to the Marion Superior Court; Mary L. McQueen,²⁶⁷ elected to the Shelby Superior Court; Ruth D. Reichard,²⁶⁸ appointed to a Marion Municipal Court; Judith A. Stewart,²⁶⁹ elected to the Brown Circuit Court; Lisa M. Traylor-Wolff,²⁷⁰ appointed judge of the Fulton and Pulaski County Courts, and Nancy E. Boyer,²⁷¹ appointed to the Allen Superior Court. Marion Superior Court Judge Betty Barteau moved from that court to the Indiana Court of Appeals on January 1, 1991. Leaving courts that year were Patricia McNaghy, who retired after eight years on the bench, and Suzanne Dugan, who resigned after four years on the bench.

In 1992, four women left the bench. Those removed from the ranks in 1992 were Elizabeth Ward Hammond Swarens, Kelley Huebner, and Darlene Mears, all of whom lost elections, and Antoinette Cordingly, whose life was claimed by breast cancer.

In 1993, eight women assumed the bench. Those were: Ronda R. Brown,²⁷²

260. Questionnaires, *supra* note 2; see Harcourt, *infra* Appendix C.

261. Questionnaires, *supra* note 2; see Mann, *infra* Appendix C.

262. Questionnaires, *supra* note 2; see Riley, *infra* Appendix C.

263. Questionnaires, *supra* note 2; see Ayers, *infra* Appendix C.

264. Questionnaires, *supra* note 2; see Craney, *infra* Appendix C.

265. Information about the Honorable Susan Hemminger, deceased, was obtained from public records and interviews by this author (1994) (on file with author); see Hemminger, *infra* Appendix C.

266. Questionnaires, *supra* note 2; see Lopossa, *infra* Appendix C.

267. Questionnaires, *supra* note 2; see McQueen, *infra* Appendix C.

268. Questionnaires, *supra* note 2; see Reichard, *infra* Appendix C.

269. Questionnaires, *supra* note 2; see Stewart, *infra* Appendix C.

270. Questionnaires, *supra* note 2; see Traylor-Wolff, *infra* Appendix C.

271. Questionnaires, *supra* note 2; see Boyer, *infra* Appendix C.

272. Questionnaires, *supra* note 2; see Brown, *infra* Appendix C.

elected to the Parke Circuit Court; Diana LaViolette,²⁷³ elected to the Putnam Circuit Court; Susan Macey-Thompson,²⁷⁴ appointed to a Marion Municipal Court; Nancy H. Vaidik,²⁷⁵ elected to the Porter Superior Court; Sheila M. Moss,²⁷⁶ appointed to the Lake Superior Court; Mary Beth Bonaventura,²⁷⁷ appointed to the Lake Superior Court, Juvenile Division; Rosemary Higgins Burke,²⁷⁸ appointed to the Fulton Superior Court; and, Heather M. Mollo,²⁷⁹ appointed to the Brown Circuit Court. Leaving that year were Judith Stewart, who resigned her Brown County bench to become the third woman in Indiana history to serve as U.S. Attorney, Southern District of Indiana, and Susan Hemminger who lost her battle with cancer.

No additional women assumed the bench in 1994. However, effective January 1, 1994, Patricia Riley, left her position as Jasper Superior Court Judge, accepting an appointment to the Indiana Court of Appeals. Also, in 1994, Karen Love was elected to the Hendricks Superior Court with her term beginning January 1995, Myra C. Selby was named by Governor Evan Bayh as the first African-American and the first woman to serve on the Indiana Supreme Court with her term beginning in 1995, and Clementine Barthold retired from the Clark Superior Court effective December 31, 1994.

At the end of 1994, thirty years after the first Indiana woman assumed the bench, thirty-seven women were serving on the various municipal, superior, circuit courts and courts of appeals throughout the State of Indiana.²⁸⁰ At that time, Indiana had a total of 301 judges on these courts. Thus, at the close of 1994, women held 12.3% of the judgeships in Indiana.²⁸¹

The latest year for which figures are available, 1991, show that there were 11,304 attorneys in Indiana, 9450 men (83.6%) and 1854 women (16.4%).²⁸² These statistics are comparable with those in the medical profession. At the end of 1992, there were 8761 doctors in Indiana, 7228 (82.5%) men and 1533 (17.5%) women.²⁸³

Women began serving in the Indiana General Assembly much sooner than women served in the judiciary. In the Indiana House of Representatives, the first woman was elected in 1921, and in the Indiana Senate, a woman was first elected

273. Questionnaires, *supra* note 2; see LaViolette, *infra* Appendix C.

274. Questionnaires, *supra* note 2; see Macey-Thompson, *infra* Appendix C.

275. Questionnaires, *supra* note 2; see Vaidik, *infra* Appendix C.

276. Questionnaires, *supra* note 2; see Moss, *infra* Appendix C.

277. Questionnaires, *supra* note 2; see Bonaventura, *infra* Appendix C.

278. Questionnaires, *supra* note 2; see Burke, *infra* Appendix C.

279. Questionnaires, *supra* note 2; see Mollo, *infra* Appendix C.

280. See Map of the State of Indiana Showing Distribution of Women Judges (By County), *infra* Appendix D.

281. Information obtained from Indiana Judicial Center, Indianapolis (1994) and summarized graphically in Appendix E.

282. CURRAN, *supra* note 104, at 65.

283. Information obtained from Indiana University School of Medicine, Indianapolis (1994) and summarized graphically in Appendix F.

in 1943.²⁸⁴ Their early entry into the legislature may have been aided by the fact that they did not have to first win a battle to gain admission to law school and to the bar. But they did have to be political, credible, and knowledgeable, the same attributes required of women judges. Although women legislators started sooner, their progress in increasing their numbers was as slow and ponderous as that of the women judges. The chart in Appendix G compares the number of women and men in the Indiana Senate from 1965, the year the first woman assumed a bench, through 1994; it also compares the number of women in the Indiana House of Representatives for each of the same years. The highest number of women in the Indiana Senate to date was 1994, when there were thirteen women comprising 26% of the Senate. The House women made their strongest showing in 1993, with nineteen of the 100 sitting members being women. In 1994, that number dropped back to fifteen women members.²⁸⁵

As compared to the number of Indiana women lawyers (16.4%), women doctors (17.5%), women senators (26%), and women representatives (15%), women judges (12.3%) are underrepresented. However, Indiana's pool of women lawyers which are gaining the experience necessary for a judgeship is growing dramatically.²⁸⁶ In 1971, when one woman held a bench in Indiana, only 4% of the students graduating from Indiana law schools were women. In 1980, the percentage of women graduates reached 30%, and it has subsequently fallen beneath that percentage in only two years. In 1991, the women graduates constituted 40% of the total graduates, the highest of any year. In 1993, when thirty-seven women were serving on the judiciary for a total of 12.3% of the total judges, 39% of the total graduates from Indiana law schools were women. The first of the obstacles for women reaching the judiciary, the educational obstacle, now clearly appears to have been overcome. With the growing pool of women lawyers, the other obstacles of politics and experience will no doubt fall also.

V. THE ARDUOUS CLIMB FROM BAR TO BENCH

Why did it take so long for women to make the leap from lawyer to judge?

Entry to a judgeship is restricted by educational requirements, professional recognition and political credentials. In each of these areas, women have faced significant obstacles.²⁸⁷

First, the prohibition or discouragement of women's admission to law school kept the pool of educationally qualified women low for many years. At the beginning of the nineteenth century, women were routinely denied secondary education because of their sex.²⁸⁸ Women's minds were considered inferior, and an education was not deemed necessary to performing so-called women's

284. INDIANA LEGISLATIVE SERVS. AGENCY, WOMEN LEGISLATORS (1994).

285. *Id.*

286. Information obtained from the American Bar Association, Indianapolis (1994) and summarized graphically in Appendix H.

287. See generally Cook, *supra* note 206.

288. Weisberg, *supra* note 32, at 499.

functions of bearing and raising children.²⁸⁹ It was not until 1821 that a publicly endowed institution for women opened.²⁹⁰ Oberlin, in 1833, was the first institution to admit all students without reference to race or sex.²⁹¹ Mount Holyoke was founded for women's higher education in 1837, and between 1865 and 1879, the women's colleges, Vassar, Smith, Wellesley and Radcliffe, were founded.²⁹²

As early as 1846, the minutes of the Board of Trustees of Indiana's Vincennes University reflect that the University had thirty-one female students in attendance, and in 1855 the University acquired a frame building for the purpose of a Female Classical Institute.²⁹³

The Indiana General Assembly passed a statute in 1820²⁹⁴ founding an educational institution known as Indiana Seminary at Bloomington. In 1828, it became Indiana College, and in 1838, it became Indiana University. In 1867, Sarah Park Morrison became the first woman admitted at Indiana University.

Once women gained a foothold in general education, the next step was to open law schools to women. In 1870, Union College of Law (now Northwestern University School of Law) became the first law school to graduate a woman.²⁹⁵ This was just the beginning. Gradually, other law schools admitted women.

In Indiana, Tamar Althouse Scholz was apparently the first woman to graduate from an Indiana law school. In 1892, Scholz graduated from Indiana University School of Law—Bloomington.²⁹⁶ In 1893, two women, Merta Mitchell and Mary McCulloch, received LL.B.'s from DePauw University School of Law.²⁹⁷

The school of law presently known as Indiana University School of Law—Indianapolis was established in 1893 as the Indiana Law School.²⁹⁸ It began operating in the 1894-95 academic year, and the class of 1896 had two women graduates, Caroline Hendricks and Helen Parry.

Valparaiso University School of Law claims Frances Tilton Weaver as its first woman graduate. Tilton was in the class of 1925.²⁹⁹ Tilton practiced in Chicago

289. *Id.*

290. *Id.* at 500.

291. *Id.*

292. *Id.*

293. Memorandum from Dr. Phillip M. Summers, President of Vincennes University to author (Jan. 24, 1996) (memorandum on file with author). Legend has it that Princess Red Bud, granddaughter of the Piankeshaw Chief, Son of Tobacco, as a girl of fourteen or fifteen years of age came to Vincennes from northern Indiana following the 1811 Battle of Tippecanoe. With the assistance of Governor William Henry Harrison, General John Gibson, and Francis Vigo, she enrolled as a student at Vincennes University. If the legend is true, she became not only the first woman, but also the first Native American to attend Vincennes University. *Id.*

294. Act of Jan. 20, 1820, ch. 48, 1819 Ind. Acts 82 (superseded).

295. Weisberg, *supra* note 32, at 485.

296. Information obtained from Indiana University School of Law—Bloomington (1994).

297. CLIFTON J. PHILLIPS ET AL., *DEPAUW: A PICTORIAL HISTORY* (1987).

298. Ronald W. Polston, *History of the Indiana University School of Law—Indianapolis*, 28 IND. L. REV. 161, 161 (1995).

299. Professor Ruth Vance, *Frances Tilton Weaver: Our Own "First Woman,"* AMICUS:

until 1933 when she joined her father in practice in Valparaiso.³⁰⁰

Notre Dame School of Law was the last school of law in Indiana to admit women, and nearly the last in the nation, followed only by Washington & Lee. In 1966, Carol Masson and Diana Shaw were admitted to Notre Dame School of Law. Notre Dame School of Law's first woman graduate was Graciela Olivarez in 1970.

Until 1975, only a token number of women were admitted to law schools. From 1951 to 1970, women made up 3% of the lawyer population in the United States.³⁰¹ In 1980, it increased to 8%, in 1985 to 13%, in 1991 to 20%, and is projected to be 27% in 2000.³⁰²

If we assume that once law degrees are obtained by women they will have the same opportunity as men for legal jobs, we would surely see the same percentage of women judges as women lawyers. However, statistics show that this has not been the case. Arabelle Mansfield of Iowa, the nation's first woman lawyer, was admitted in 1869.³⁰³ It is safe to assume that Iowa's other women were admitted to practice after Mansfield, but it was 100 years before Iowa had its first woman judge.³⁰⁴ Indiana dates its first woman lawyer from 1875, and its first woman judge from 1965, ninety years later.³⁰⁵ The average length of time between a state's first woman lawyer and its first woman judge was fifty-two years.³⁰⁶ Therefore, education alone did not lower the barriers between women and the judiciary.

A 1970 census of lawyers revealed that women are still concentrated in government work, in divorce and estate work, and in legal research.³⁰⁷ In 1991, women lawyers were still over represented in government, free legal service programs, and as support personnel for the judicial system.³⁰⁸ Rarely would the areas where women lawyers were concentrated routinely bring about the necessary professional recognition to demand or even suggest an appointment to a bench.

The eligibility pool from which judicial selections are made usually consists of trial lawyers or persons with experience in a courtroom. Until recent years, that pool was made up primarily of men. Women lawyers were historically dissuaded from litigation. Initially, this dissuasion was based upon a cultural belief that refined women should not speak in public places, and this resulted in women being lodged in specialties that seemed appropriate for their sex— divorce, child issues, probate or real estate law. These specialties rarely gave women the

VALPARAISO SCHOOL OF LAW ALUMNI MAGAZINE, Winter 1994, at 8.

300. *Id.* at 9.

301. CURRAN ET AL., *supra* note 102, at 10.

302. CURRAN, *supra* note 104, at 8.

303. Berkson, *supra* note 4, at 290.

304. *Id.*

305. *Id.*

306. Beverly B. Cook, *Women Judges: A Preface to Their History*, 14 GOLDEN GATE U. L. REV. 573, 598 (1984); *see* Berkson, *supra* note 4, at 290.

307. CURRAN ET AL., *supra* note 102, at 38-44.

308. *Id.*

professional recognition necessary to obtain a judgeship. As late as 1983, only 6% of the members of the American Trial Lawyers Association were female.³⁰⁹ As more women lawyers concentrate in litigation, these numbers will change with a corresponding change in the number of women in judgeships.

The third barrier between women and judgeships was political credentials. For many reasons, few women ran for office. Perhaps the most controlling reason was that they did not perceive themselves as candidates. Women were used to being the coffee makers, the voter registrars, and the envelope stuffers, but not the candidates. Part of the cause of this perception was that there was no support network for women urging them to become candidates, nor was there a network to support a woman judge after she assumed a bench. Each woman judge felt unique and isolated. This changed dramatically in 1979 when Joan Dempsey Klein and Vaino Spencer, both California judges, issued an invitation to women judges across the United States to convene and organize. One hundred women answered the call, met in Los Angeles, California, and formed the National Association of Women Judges (NAWJ).³¹⁰ It was an exciting time for women judges. Many met other women judges for the first time and all recognized a sense of emotional and professional support non-existent before then.³¹¹

The National Association of Women Judges (NAWJ) left their organizational meeting in Los Angeles with specific objectives and goals, but most importantly, with the idea that these objectives and goals could be accomplished. The goals were 1) to place the first woman on the U.S. Supreme Court; 2) to speak out against and end discrimination against *all* women in the courtroom, not simply women judges; and 3) to work for judicial selection of women in all states.³¹²

The NAWJ's goal of placing the first woman on the U.S. Supreme Court was accomplished in 1981 when NAWJ member Sandra Day O'Connor was appointed to the Court by President Ronald Reagan. To achieve their second goal of ending discrimination against women in the courtroom, the NAWJ helped create task forces in a majority of states to identify discrimination in the courts and to eliminate it by creating and encouraging the use of judicial educational materials.³¹³ The first task force on women in the courts was created in 1983, and by 1993, task forces had been created in thirty-four states, the District of Columbia, Puerto Rico, and two federal circuits.³¹⁴

The task forces began their work by identifying the areas in which gender makes a difference in courts and then established educational projects to change the culture to eliminate those differences. The task of identifying gender discrimination seemed simple on its face. However, when the task forces began

309. MORELLO, *supra* note 8, at 174.

310. Gladys Kessler, *NAWJ: The Value of Sisterhood on the Bench*, TRIAL, Aug. 1983, at 55, 55.

311. *Id.*

312. *Id.*

313. *Id.*

314. Lynn Hecht Schafran, *Gender Equality in the Court Still on the Federal Agenda*, 77 JUDICATURE 110, 110 (1993).

to meet, they recognized that many actions affecting women's credibility in a courtroom were not acknowledged by those in power as being discriminatory. For example, representative of the findings of the thirty-six task force reports are:

1. the practice of addressing women litigants, women lawyers, and often women judges by their first names or terms of endearment, whereas men are addressed by their title or surnames was not perceived by many as discriminatory;
2. the practice of commenting on the attire or appearance of a woman in the courtroom was considered appropriate by many;
3. the regular failure to treat domestic violence as a crime was not seen as denying women their rights;
4. the fact that child support orders rarely considered the reality of woman's earning power was not acknowledged;
5. the holding and application of different standards for men and women and believing in female stereotypes was often not considered discriminatory; and
6. the relating of sexist jokes or stories by people presiding in courtrooms was not widely believed to be demeaning to female litigants, witnesses or lawyers.³¹⁵

Once these and other problem areas were identified, the development of the educational programs began. Many of the task forces presented their findings at state judicial conferences; state judicial educators were provided with gender discrimination programs to present at their judicial meetings. The national judicial educators began to incorporate these educational programs into their presentations. These major judicial reforms were initiated by the National Judicial Education Program to Promote Equality for Women and Men in the Courts, a project of the National Organization for Women (NOW) Legal Defense and Education Fund in cooperation with the NAWJ.³¹⁶

The third goal of increasing the number of women judges throughout the nation has come closer to reality each day since 1979, the inaugural year of the National Association of Women Judges' existence. This progress was partly possible because NAWJ created an educational program to teach women lawyers the steps other women had successfully taken to be elected or appointed to the

315. Task force reports are available from the NAWJ. *See also* NATIONAL CENTER FOR STATE COURTS & NATIONAL ASS'N OF WOMEN JUDGES, PROCEEDINGS OF THE NATIONAL CONFERENCE ON GENDER OF WOMEN JUDGES, BIAS IN THE COURTS (1990) (discussing results of several state task force surveys).

316. Lynn Hecht Schafran, *Is the Law Male?: Let Me Count the Ways*, 69 CHI.-KENT L. REV. 397, 397-98 (1993).

bench. This program, "So You Want to Be a Judge," was presented in many states. Although the program has not yet been presented in Indiana, forty-three of Indiana's forty-eight women judges have assumed the bench since the 1979 formation of NAWJ.

The supportive network needed by women judges was created and began to function with the organization of the NAWJ in 1979. By acting collectively, women judges' impact on the law is far stronger than might be expected from their small numbers.³¹⁷

VI. A PROFILE OF INDIANA WOMEN WHO HAVE MADE THE ARDUOUS CLIMB³¹⁸

Indiana's women who have made the arduous climb to the bar and then to the bench have many different backgrounds. It is safe to say that the majority are Hoosier born and educated, sought the bench to improve the system and to contribute to society, and most of Indiana's women judges have enjoyed the challenges of their positions.

A. Education

Of the forty-eight women who have served the Indiana judiciary in the last thirty years, thirty-four graduated from Indiana high schools and fourteen graduated from high schools outside the state. Six of these high schools were religiously affiliated. One was a private school.

Thirty-four of the women obtained their undergraduate degrees from Indiana colleges. Twelve graduated from Indiana University. Ball State University and Indiana State University each graduated four women that became judges. Valparaiso University, Indiana University-Purdue University at Indianapolis, Butler University, Purdue University, Earlham College, Hanover College, DePauw University, Marion College and Franklin College all had women graduates who joined the judiciary. The remaining women received their undergraduate degree from various out-of-state colleges. Three women entered law schools without undergraduate degrees: Betty Barteau, Betty Shelton Cole and Clementine Barthold. Judge Barthold pursued her undergraduate work at the same time she was in law school, and received her undergraduate degree two years prior to receiving her law degree.

Not all of the judges knew at the time that they graduated from college that law school was their next step. Several held jobs before going to law school. Eight of the women were teachers, five were involved in social work or some form of probation work, four were secretaries, and three were homemakers. The others went directly from college to law school.

317. NATIONAL ASS'N OF WOMEN JUDGES, NEWS ANNOUNCEMENT 2 (1988).

318. The remaining portion of this Article contains some quotations and statements that are not credited to their authors. This omission is done because the authors of such statements have requested anonymity regarding their responses. Such information is taken from questionnaires that were sent to and returned from Indiana women judges, and are on file with this author. *See supra* note 2.

When enrolling in law school, twenty-one of the future judges chose Indiana University School of Law—Indianapolis, and twelve selected Indiana University School of Law—Bloomington. Seven graduated from Valparaiso University School of Law and two from Notre Dame School of Law. Thus, an astonishing number, forty-two of the total forty-eight women judges, received their legal education in Indiana. Arizona State University School of Law claims one Indiana woman judge as an alumni, as does The Ohio State University School of Law, Northern Illinois University School of Law, Suffolk University School of Law, New York University School of Law, and University of Louisville School of Law. All Indiana women judges in this study began their judicial career at the trial level and most were graduates of parochial schools. This perhaps partially proves Professor Cook's theory that, "Graduation from a parochial law school sets the student on the path to trial judgeship; but graduation from an elite school is a credential which facilitates entry to the appellate bench."³¹⁹

While in law school, five of the women judges, Shields, Barteau, Barker, Stewart and Stein, were members of their respective law reviews, and Shields and Barteau were members of the Order of the Coif. Graduating with honors were Boyer, Comer, Emkes and Mann, who graduated *cum laude*, Barteau and Hand with distinction, Gray with high honors, and Harcourt, *magna cum laude*. Judge Vaidik, when asked about her honors received in law school, replied that her honors were twin daughters born to her during Christmas break in her second year.

B. Family Life

Among the forty-eight women judges in Indiana, there have been sixty marriages; four of the judges have not married. Of the forty-four women who married, there have been twenty-five (57%) divorces, eleven (44%) of which took place after the women took the bench. Twenty-two of the forty-four women (50%) remain married to their first spouse, and eleven (25%) have been divorced and have not remarried. Three of the women judges have been widowed. There are eighty-four children born to these women judges, and they are parents to nineteen stepchildren. They have been married to twenty-three attorneys, and they have fifteen children who are attorneys.

In discussing the impact of their professional lives on their marriages, six of the women believed it had no impact at all, and five felt that it had been good for their marriage. In explaining her career's positive effect on her marriage, one stated that loving her work had helped her marriage and another believed that because her husband is an attorney, they can share better discussions. Another indicated that her entire career had helped to make the marriage stronger. Judge LaViolette said that a career such as hers has a significant impact on a marriage, "requiring a well-adjusted male who is very supportive. I am lucky to have such a husband."

However, most felt the judgeship added great stress to the marriage, even when it ultimately made the relationship stronger. For the judges who practiced law with their husbands prior to taking the bench, the change in positions created

319. Cook, *supra* note 306, at 591.

different stresses in the marriage. One judge said her elevation to the bench affected her attorney husband's self-esteem and severely limited his practice. Another found that her career as an attorney was just fine with her attorney husband, but when she assumed the bench, there was a "power shift" in his mind causing temporary problems.

Although these two couples have stayed together, all married women judges were not able to resolve their problems. The "power shift" in one relationship brought about a divorce. One judge stated that after becoming a judge, her position of authority and economic equality created changes in expectations that were not unresolvable. Several judges reflected that the commitment of time and energy required on the bench left little for the family. The fact that the women "love their work and want to do it well" also caused rifts for several couples. One judge related that her career as a lawyer was a plus, but when she applied for the bench, her husband considered it an act of disloyalty; they were later divorced.

Other extremes were noted in that one judge related that her husband left on the first day she took office. Another stated that her attorney husband was opposed to her being a judge and, after she decided to become a candidate, they divorced between the primary and general elections. Yet another judge said the fact that her husband felt less significant after her election and that she had less free time to spend with him led to a divorce one year after she assumed the bench. One judge, with a different twist, said her husband "dumped" her the day she lost a judicial election.

As one judge stated, it is tough to live with a career-driven woman. Where the woman has higher visibility and name recognition, unless the husband is tolerant and self-assured, an uncomfortable tension often develops.

C. Income

At the time of this writing, judicial salaries in Indiana are among the lowest in the nation.³²⁰ Only thirteen of the women judges in Indiana have income in addition to their judicial salary. The additional income comes from various sources such as consulting and writing, social security, farm income, an annual financial parental gift, teaching, and investments.

Nineteen of the women responded that their spouse's income was less than their judge's salary, two said that it was approximately the same, and the other married judges indicated that their spouse's income was usually greater than their own.

320. In 1994, the statutory annual salary for a full-time trial judge was \$61,740. IND. CODE § 33-13-12-7.1(a) (1993). This ranked Indiana 50th in the nation in judicial salaries. When the fact that some other counties supplement this income and the fact that some judges earn extra income through special judge fees were taken into account, Indiana ranked 46th in the nation. NATIONAL CENTER FOR STATE COURTS, REPORT, SURVEY OF JUDICIAL SALARIES IN STATE COURT SYSTEMS (1994). Effective August 1, 1997, full-time Indiana trial court judges will earn \$90,000 per year. IND. CODE § 33-13-12-7.1(a) (Supp. 1996).

D. Path to the Profession

The judges' reasons for entering the legal profession varied. Only five of the women knew at age twelve that they wanted to be a lawyer. Eight wanted to be teachers, and the rest desired professions ranging from homemakers and mothers, to a nun, horsetrainer, actress, astronaut, a CEO, and a ballet dancer. However, at the age they did decide to enter law school, there is seemingly common ground. Each felt that she could contribute special talents to the profession and to the public. For example, Judge Jimison said:

When my son, Kwamé, was born and placed in my arms, all the questions I should have considered prior to his conception surfaced. I concluded that becoming an attorney would help me to give him a better life. He was born before I went to college.³²¹

Judge Mann said:

There was no incident that caused me to enter the legal profession. Even in high school I knew that I would do something to improve people's lives, social work, law, something like that. I was very interested in civil rights and the role of the lawyers and the issues of the 60s.³²²

Judge Reichard said:

I can't identify one "epiphany," as it were. However, I grew up in the 60s, and I was very aware of current events. I lived in Cleveland not far from Kent State. I saw the Cuyahoga River burn and trash floating on Lake Erie. My older brother, Peter, was in Viet Nam. I saw black people die for their civil rights, and I saw women march for theirs. All of this, along with the usual socialization for girls back then (be nice, do what you're told, don't challenge authority, accept your status and don't question why you aren't permitted to do some things your brother can do, etc.), contributed to an awareness of injustice, and I believed that being a lawyer might give me a chance to work for Justice.³²³

Judge Stickel said:

My grandmother was very important to me. She often spoke of her struggles in the Ukraine and the Soviet Union. Power was often abused. People were deprived of their rights and possessions. My grandfather was sent to Siberia without a trial and later executed during a purge. These stories and the sense of unfairness impact me greatly.³²⁴

Judge Ward said, "I was living in Washington, D.C., during the Watergate era and

321. Questionnaires, *supra* note 2.

322. *Id.*

323. *Id.*

324. *Id.*

was fascinated by the legal proceedings.” Judge LaViolette said, “Working at the Indiana Women’s Prison as a teacher, my students asked so many questions about the law I became interested.”

E. The Practice

These future judges had many different experiences when they left law school and sought jobs. During an interview with a private firm, a 1961 graduate was told that the firm would not consider hiring her because it had inadequate restroom facilities for a female associate. A 1965 graduate said, “[o]ne judge interviewed me for a part-time commissioner job and then said he couldn’t hire me because I was a woman, but he wasn’t too prejudiced to interview me.” A 1969 law school graduate said, “Getting interviews with law firms after law school was nearly impossible, never mind landing any offers.” Another 1969 graduate of law school was assigned to a major law office to be an intern. When she arrived, she was shown to her office, which was a typing pool. One attorney offered a 1971 graduate the job of law librarian, stating that the county was not ready for women lawyers. Another 1971 graduate did not get a job with a law firm because the partner’s wife did not want any women attorneys in the firm. A 1976 graduate returned to her home town to practice law and at one of her first interviews with a law firm she was asked, “Do you have a boyfriend? Are you intending to get married? Are you intending to have children? If you have children, will you practice law or stay home with them?” As late as 1980, one future judge applied for a position as a manager of a Chamber of Commerce but was advised that they were looking for a man.

A great number of the women law graduates, particularly those in the late 1970s and the 1980s, indicated that if there was a gender problem they were not aware of it. No less than four of the women, the same ones who answered that jobs were not less available to them because of their gender, answered that when they graduated from law school they were hired as deputy prosecutors for sex crimes because the prosecutors wanted a woman in the job at that time. However, eighteen of the women responded that they started their own practice or joined practices with a family member when they first got out of law school, often because they had no other alternative. When one future judge graduated from law school, her brother, uncle and cousins did not ask her to join a family law firm in which her father and husband were partners. The law firm was founded by her grandfather. She believed that had she been a male, she undoubtedly would have been asked to join the firm. After serving two terms on the bench, she and her daughters now practice in their own firm.

When asked if they ever felt that they experienced economic discrimination prior to assuming the bench because of their gender, fifteen of the women said no. The discrimination cited by the others included: having attorney fees arbitrarily reduced by a male judge after an affidavit of hours had been presented; being less able to obtain credit; being told that a certain salary would be paid because that is what the employers were able to get women to work for; not receiving the prior salary for a position because the job had been held by a man; being refused a credit card because there was no husband or father to co-sign or because of a requirement that the card be issued in the husband’s name; receiving a lower

salary than the male lawyers at a law firm; missing out on promotions in the system because of being a woman; being told that an unmarried woman chief deputy prosecutor does not need to be paid what a man with a family would earn in that position; and clients assuming that their woman attorney should not charge as much as men or that she was not capable of handling the really important cases. One judge told of a professor who suggested that she should see him after she graduated from law school because he was sure he could get her a job as a legal secretary with a firm in town. She points out that this is not an example of economic discrimination, but anecdotal of the insensitive statements made to women students. It is certainly a representation of the kind of attitudes and statements that were made at the point when women were entering the legal profession. Judge Jimison said that she had failed to receive jobs, but in response to the question of whether the denials were discriminatory she replied: "I don't know. I never stopped to consider whether a denial of a job opportunity was because of race, gender, or both. I just kept right on stepping."

F. Path to the Bench

Although the women took various routes to law school, the path taken to the bench was similar for a majority of the women—public service.³²⁵ Twenty-three of the forty-eight women (47.9%) who have served on a bench in Indiana served as deputy prosecutors during their early years of practice. One, Judge Craney, was the first woman to be elected as prosecutor in the State of Indiana. Two served as Deputy U.S. Attorneys, and one was the U.S. Attorney. One served as a deputy attorney general, seven as public defenders, and three as law clerks. Fifteen (31.2%) of the women judges were sitting as referees or commissioners at the time they were elevated to the bench.

Women became interested in the judiciary for varied reasons according to their circumstances at the time. A common thread creating interest was their impatience with the manner in which their local court was being operated. Several of the women thought that they could do a better job than the incumbent judges. Therefore, they challenged the incumbents in their elections. Many thought that being in the judiciary would be meaningful work that they could do successfully. A number of the women thought that with their additional responsibilities of children, the job would require less time or energy than required by a normal private practice. One judge with young children said, "I perceived, perhaps not entirely accurately, that judges were in control, especially with respect to work hours." A number of judges indicated that they saw themselves to be resolution seekers more than advocates and, therefore, believed that they would be better suited to the bench than to the private practice of law.

325. There is no available comparable data for the male judiciary. It would be interesting to have a cohort study to determine the differences, if any, in background, training, etc., of male and female judges. Because men have been judges in Indiana from the inception of the court system, it would be almost impossible to have comparable data for male jurists as this study reflects *all* of Indiana's female jurists. However, even a study of the current judiciary, or one for specific years, would be of interest and value.

Judge Jimison said her interest in the judiciary was piqued because of some of the arbitrary and punitive orders given to people whom she represented as a lawyer. Jimison felt that the absence of women and blacks in the judiciary caused minorities to suffer because of the lack of sensitivity and the lack of desire of some of the judges to be fair and just. Jimison believed she could help fill that void. Judge Mann indicated that for her it was a combination of all factors coming together at the same time. She had always thought that judges were in a unique position to effectuate systemic changes and approaches. Mann also believed that, compared to her family law practice, a judicial position would allow her to give some time to her contemplative side. She missed research and writing and was not entirely happy with her law practice. As she contemplated all of these things, a judicial position became available. One judge said that the death of her husband created her interest by facilitating an economic necessity as well as a desire to keep busy and work full time.

Judge Reichard said:

I had some definite ideas about how a judge should perform his or her duties and how *not* to do that. I had some unpleasant experiences as a young lawyer during which I felt the judge went out of his way to humiliate me and I saw him do that to other lawyers. I thought it was terrible that this person could be given such a position of public trust and abuse it in that way. That was one motivator. I also saw some very good judges in action and that was inspiring. I felt I could at least try to become one. I basically viewed it as a type of career evolution, another form of public service.³²⁶

One judge decided to run against the incumbent judge in her county because she felt he was very politically and personally motivated, and that he used the power of the office to influence and obtain his often arbitrary goals. One said that she had been a trial attorney for so long that she began to believe she could do a better job of judging than many presently on the bench, and that she felt more women needed to be represented on the bench. Judge Traylor-Wolff indicates that when Sandra Day O'Connor was appointed to the U.S. Supreme Court, she became interested in becoming a judge.

When asked if they had a mentor, ten of the women responded that they had female mentors who helped them decide to run for the judiciary. Seven indicated that they had no mentors. The remaining responded that their mentors were usually males who were either family members or lawyers with whom they practiced.

There is a wide variance in the length of time the judges were in practice before taking the bench, ranging from thirteen months to thirty-two years. Eleanor Stein and Patricia McNaghy had been out of school thirty-two years when they took the bench in 1981 and 1983 respectively. Rosemary Burke graduated from law school in June 1992 and was appointed to the bench in July 1993. Five other women had been out of school less than two years at the time they were either

326. Questionnaires, *supra* note 2.

elected or appointed to the bench. The average number of years that the women were out of school before taking the bench was 8.8 years, and the median was eight years.³²⁷

The range of ages for women assuming the bench is twenty-five to sixty-two. The youngest woman to assume a bench was also the first woman. V. Sue Shields assumed the bench in 1965 at age twenty-five. The oldest woman to assume the bench was Clementine Barthold, who went on the bench in January 1983 at the age of sixty-two. The average age of women upon taking the bench was thirty-nine and the median age was thirty-eight. Nineteen of the forty-eight judges (39.5%) took the bench between the ages of thirty-seven and forty-one, and eleven (22.9%) took the bench between the ages of twenty-nine and thirty-two.³²⁸

It appears that even though most of the judges were not acquainted with each other at the time they assumed the bench, they may be more alike than different. Thirty-four of the women, when asked about hobbies, stated reading is one of their main hobbies. Another common hobby among the women is gardening. Very few named cooking as a hobby, although one's hobby was "cooking wonderful things."

There is a general assumption that women are more apt to be appointed than elected to the bench. In Indiana, this has not been proven to be true. Twenty-four of the forty-eight women judges in Indiana were appointed and twenty-four were elected. Additionally, a 1983 study suggests that the Republican Party has more traditional expectations for women than the Democrats and, therefore, fewer Republican women are prepared for judgeships;³²⁹ this has not proven to be true in Indiana, a Republican-dominated state. Twenty-nine (60.4%) of Indiana's women judges are Republicans, and nineteen (39.6%) are Democrats. From 1964 through 1994, fourteen Republicans and ten Democrats have been elected to serve on the bench, and fifteen Republicans and nine Democrats were appointed.

Sarah Evans Barker, a U.S. Federal District Court Judge and a Republican, was appointed by President Ronald Reagan. Republican Governor Otis R. Bowen appointed four women: Chezem, Dwyer, Mears and Cordingly. Republican Governor Robert D. Orr appointed eight women: Cole, Jourdan, Emkes, Hand, Kenworthy, Proffitt, Smith and Jimison. Ten women, Mann, Riley, Reichard, Traylor-Wolff, Boyer, Bonaventura, Macey-Thompson, Moss, Burke, and Mollo, were appointed by Democratic Governor Evan Bayh. In addition, Governor Bayh appointed Barteau, who had been an elected judge, and Riley, who had been an appointed and then an elected judge, to the Indiana Court of Appeals while they were superior court judges. Governor Orr appointed Chezem to the Indiana Court of Appeals while she was a circuit court judge. Governor Bowen appointed Shields to the Indiana Court of Appeals while she was a superior court judge.

The appointments were almost entirely along political lines. The only Democrats appointed by a Republican governor were Judge Jeanne Jourdan in 1981 and Judge Z. Mae Jimison in 1988. Judge Jourdan is from a Democratic

327. See Years of Practice, *infra* Appendix I.

328. See Age of Indiana Women Judges, *infra* Appendix J.

329. Cook, *supra* note 185, at 50.

county and at the time her name was submitted by the Nominating Commission to the governor, the three names on the panel submitted were all Democrats. Judge Jimison, a Democrat, was appointed by Republican Governor Orr to fill a position required to be filled by a Democrat. Democratic Governor Evan Bayh has appointed three Republicans: Reichard, Macey-Thompson and Bonaventura. Reichard and Macey-Thompson were both appointed to the Marion County Municipal Court. The statute creating that court requires that one-half of the seats be held by Republicans and one-half by Democrats.³³⁰ The two vacancies available when Reichard and Macey-Thompson were appointed were Republican vacancies. Therefore, Democratic Governor Bayh appointed Republicans to these positions. Bayh also appointed Bonaventura, a Republican, to a position that was not required to be filled by a member of a particular political party.

Of the twenty-four judges appointed, only the Marion Municipal Court judges were subject to reappointment.³³¹ The Honorable Sarah Evans Barker, an Article III judge, has life tenure. All other judges run for election, either in a general election or a retention election, even though they may have reached the judgeship by appointment in the first instance.

Whether the judges assumed office by appointment or by election, they fairly uniformly indicated that they received support from both men and women. There were, however, conflicts. One judge indicated that in her early years, when she was campaigning, she would be asked about her children and then told that she should be home with them. Another indicated that many women stated that they would vote for her, but they would not tell their husbands. As the years went by, the younger judges were finding that most women were generally enthusiastic and hopeful about having women on the bench. A majority of the women judges indicated that most of their financial support came from men, primarily because the men were in the positions of power to give the support. One judge indicated that she had tremendous support from men; she said that it was "partly because I had paid my dues as a trial attorney, partly because my husband is a lawyer, and partly because the incumbent developed a bad case of black robe fever." One judge recalled that running for election was "a very humbling and nourishing experience," during which she received support from all directions. Fifteen of the twenty-four women elected to judgeships successfully ran against incumbent male judges.

Political activism did not play a role in most of the judges rise to the bench. Sixteen of the women indicated that they had not been active in politics in any way prior to their assumption of the bench, and twenty-two stated that they had been political contributors in a very minor way; thus, 79% of the women judges had little or no political background. Three had been precinct committeemen, one a state delegate, and one a prosecutor. When asked if any of their family members had been active or influential politically, nineteen (40%) indicated that they had

330. IND. CODE § 33-6-1-12(a)(3) (1993) (repealed 1995).

331. This was changed by the 1995 legislature. Act of May 3, 1995, No. 16, 1995 Ind. Acts 1513 (codified in scattered sections of IND. CODE). Marion County Municipal Court judges are now superior court judges and will be elected in the future.

no family members politically active at all, but twelve (25%) of the judges had family members who had held office. Those offices held by family members ranged from county prosecutor to precinct committeemen, mayor, and Governor of the State of Indiana.

When asked what they believed swayed the appointing power when they were appointed to the bench, three judges indicated that their reputations as professionals and for honesty were important factors. Seven others indicated that their experience as trial lawyers and in the general practice of law was an important factor. Eleven indicated politics, and five indicated gender, believing that their gender was a plus at the time and place of their appointment. One judge frankly stated that people “who were my friends had done major fundraising for the Democratic party,” and that was the most important factor in her appointment. Another indicated that because she is a Republican appointed by a Democrat, the fact that she was the least politically entrenched candidate made her attractive.

When asked if they had any experiences, good or bad, during the campaign for election or appointment that were attributed to gender, twelve of the judges answered that they had good experiences. Sixteen had bad experiences and many were mixed. A number of the women indicated that their appearance was commented upon frequently; often they were told that they were too young to be or did not look like judges. Others had to fight rumors that they had abandoned their family and had affairs while running for election. When one asked a male for his support at her election, she was told that God created women as helpmates to men. One was vice-president of her county bar association at the time she was up for election, yet she received an unfavorable election recommendation from the association, and she notes that no female candidate has ever received a favorable rating by that particular county bar association. One judge located in a rural county not far from Indianapolis was told flatly by a man, “I ain’t voting for no woman judge.”

However, in spite of the sometimes negative comments, thirty judges felt that being a woman had a positive impact on their campaigns. This was especially true for those who assumed the bench in recent years. They believed that people were genuinely interested in having women on the bench at the particular times of their appointments or elections. Many of the women said that they believed that in their counties the voters and appointing powers thought it was “time” for a woman to be on the bench. Three women thought that voters believed that a woman would have more integrity and would be more trustworthy than a man.

G. Struggles for Fairness as Judges

Once on the bench, most of the women judges felt that they received less respect than the men judges from other judges, members of the bar, court officials, and employees. Most women judges felt that they had to prove themselves before being accepted by members of the bar, and most received challenges from all directions testing their authority, knowledge and ability to do the job. One judge said that she was openly treated graciously, but that there were always people who did not take her seriously because of a number of factors, such as her age, her lack of years practicing law, her gender and the type of cases that she handled. Judge Jimison indicated that the other judges, most members of the bar and court

officials treated her fine, but the employees she inherited from her predecessor, who had been forced to resign, "gave her hell" and tried to make every day a miserable experience. Another judge said that the employees she inherited from the judge whom she replaced were resentful and defiant. Another said that she had problems with respect from the bar and her employees who were present when she went onto the court, but the public treated her alright, especially because her expectations were not too high. She went on to say:

Come to think of it, they still aren't too high in this area. Maybe I am immune to all of the little indignities because I spent so many years as a prosecutor in the mental health court, but basically all I ask [is] that people are quiet, [and that they] do not have violent outbursts in the courtroom and office areas.³³²

Thirty (65.2%) of the women surveyed reported they did not feel that they received the same respect as did male judges. The primary indication of disrespect was in the manner in which the women judges have been addressed. The women judges were often called by their first name rather than "judge." One judge said that she would often walk down the street with a male judge and attorneys would say, "Hello, judge." to him, and not speak to her or, if they did, they would call her by her first name. A number of the women said that they were repeatedly called "sir" on the bench, and two reported that they had been called "honey" while presiding. Others believe that they are treated unfairly in bar polls and feel excluded in many ways. Two indicated that they did not believe that their views on issues were given the same weight as men's views on the same issues. For example, if a woman judge suggests an idea in a meeting, it is ignored, but if the same idea is expressed by a male judge, it is acted upon. Judge Burke said:

I have a sense that the idea of "judge" has certain contours in the minds of most people. If a person is male, silver haired, very articulate, dignified, dark suit, etc., the contours of that idea are completely filled and satisfied. That person is immediately fully congruent with the idea of "judge." The more a person differs from that idea the further he or she has to walk to become congruent.³³³

Many described isolated incidents of a lack of respect for the position. One judge relates that one male attorney handed her an exhibit and asked her to make a copy of it, even when she was in her robe at the time. A litigant asked another judge, "Is this a real court?"

Eleven judges (24%), however, stated that they had not noticed they received any less respect than that accorded to men judges. One judge stated that persons who would not show respect to her probably would not show respect to male judges either. One judge said that the judge she succeeded was not at all well respected. Thus, she felt at least as respected as he had been and perhaps even more so.

332. Questionnaires, *supra* note 2.

333. *Id.*

Twenty-six (58%) of the women felt they had suffered discrimination while being on the bench. One indicated that a particular attorney took it upon himself to become her “babysitter” and actually questioned her staff as to her whereabouts if she was not in the office on a particular day or afternoon. When she took steps to curtail his behavior, he attempted to recruit a male to run against her in the subsequent election. Another judge stated clearly what several others surmised: that they are left out of professional-type outings, such as golf matches, trips to the horse races, and things of that nature, to which the men judges are invited. One judge stated that she is not readily invited to social banter over a beer or lunch with the other judges. Another judge stated:

As for professional acceptance, I am aware that certain behavior and traits, when demonstrated by women in their interactions with the bar, are viewed and characterized in pejorative terms, though they are received either with neutrality or with some admiration when men exhibit the same behavior. I frequently read the judicial evaluations conducted by the bar and wonder if the commentators even know me. Male judges are described as firm, demanding, running tight ships, decisive. Women judges are not dealt with so lightly.³³⁴

Judge Boyer indicated that an attorney informed her that a hearing scheduled for the next day in her court was going to be settled and suggested that she could take the extra time to go shopping at the mall. One judge even indicated that an attorney had referred to the potential for having a case scheduled for “the wrong time of the month.” Another said that she has encountered, and still does, outright rudeness in the courtroom from defendants and she sincerely doubts that they would act that way in front of older, gray-haired, distinguished men judges. Additionally, some of her male colleagues tend to view any woman judge, “whether it is me or some other judge who is interested in women’s issues or who described something as discriminatory, as a crazy, rabid feminist.” Seventeen judges stated that they had not experienced discrimination.

In one county, when the second woman judge was elected, they were referred to by a local attorney as the “Killer Bees.” When a third woman in that county ran for a judgeship, several male attorneys commented, “Aren’t two enough?”

Fourteen (31%) women said that, while on the bench, they had been the subject of sexual harassment. This harassment ranged from sexual advancements, to sexual innuendos, and being told by political superiors in their party that sex and money equal power. Other judges relate being referred to by their colleagues as “you girls.” One judge indicated that, when she was a deputy prosecutor, her boss gave her assignments that were secretarial in nature, a type of assignment never given to her predecessor, a male, nor to her successor, a male. When she assumed the bench, a male attorney in her city took it upon himself to come to her office and give her advice on her hair and makeup and wardrobe so that she would look like a judge. He then told her that in the preceding four years, when they had worked closely together, he would have liked to “get into [her] pants.”

334. Questionnaires, *supra* note 2.

When asked if attitudes had changed over the years that they had served as judges, most women indicated that there had been a change simply by virtue of the fact that there are greater numbers of women on the bench. Numbers make a difference. Another factor helping to change attitudes is that women make up an increasing and tremendous part of the work force. A greater number of women working in a greater number of areas make women in the judiciary more acceptable. Others more cynically suggest that attitudes have not changed, but people are less likely to manifest their attitudes in words or deeds.

H. Jurisdiction and Work Preferences

Indiana courts are not uniform throughout the state as to the kind of cases a particular court will hear. Eighteen (38%) of the women entered the judiciary at the lowest level court in their county. Only two of those judges moved from the lowest level in the county to a higher level in the same county. In Marion County the lowest level court of record is the municipal court.³³⁵ In some counties it is the county court and in others it is the superior court, county division. Many of those county courts were changed to superior courts as time elapsed, but, although the name changed, the work remained the same. Judges in these courts remain on the same bench unless appointed or elected to another position.

Twenty-two (45%) of the women judges in Indiana preside over a court with general jurisdiction. Fourteen judges (29.1%) are on courts specializing in criminal law, five on courts specializing in juvenile law, two on courts specializing in civil law, and three on courts specializing in family law. The specialization was by assignment in most cases. When asked what kind of cases they most enjoy, ten judges answered civil law, fifteen criminal law, three family law, three juvenile law, one medical malpractice, two general law, two small claims, two first time offenders, and one any difficult case involving research and study. One judge answered that any case well-prepared by attorneys with different issues was a pleasure to try. Several agreed with Judge Shields that they liked every kind of case that came before them. Judge Jimison and Judge Lopossa agreed that there was little joy in criminal court for any judge.

When asked what their strongest dislikes were in their trial work, without question, divorce and child custody led the list of those responding, with small claims following close behind. Twelve judges said divorce was their least liked area of law, nine said child custody, and seven said small claims was their least liked.

The judges were asked to review the entire work of the court to determine what they least liked. Again there was strong agreement. Twenty (44%) of the women indicated that, without question, they liked administration and paperwork less than anything else they did on the bench. Most explained that they were not trained to administer employees or to deal with salary raises or appropriations from county councils and did not like having to do such tasks. Two of the judges indicated that the part they are least comfortable with is politics, specifically running for office in a political race. One judge in a specialized court indicated

335. Marion County Municipal Court, now Marion Superior Court, *see supra* note 331.

that she disliked the monotony of doing initial hearings over and over again, repeating herself so many times each day. She further stated, "I don't have time to think straight. I want to try and move my calendar and aim for scheduling my cases within the ABA guidelines." One indicated that what she liked the least was the fact that she did not have time to think any more. She stated, "I'm like a gerbil in a cage on a treadmill."

Even in spite of the areas of the work that they disliked, when asked generally if they liked the work of being a judge, thirty-nine answered they loved it, four answered that sometimes they liked it and sometimes they did not, but no one answered no.

I. The Trails Blazed

Thirty-three of the forty-eight women (68.7%) surveyed were the first woman to sit as a judge in their respective counties. Judge Barker was and remains the first and only woman to be a federal district court judge in Indiana. Judge Shields, the first woman trial judge and appellate judge, is the only woman to serve as a U.S. Magistrate Judge in Indiana.

Five of the eleven women judges who left the bench, did so because they lost elections; two died and four left for retirement or personal reasons. Only three of the eleven women leaving the bench were succeeded by women.

VII. HAVE WOMEN JUDGES MADE A DIFFERENCE NATIONALLY?

Traditional wisdom seems to compel the belief that women judges have different experiences in life and, as a result, come to courts with different perspectives than those possessed by men judges. Although research has shown that women in the general public have a different perspective on politics than do men,³³⁶ it has not been clearly established whether this difference translates into different decisions or approaches to decision-making. The difference certainly suggests that women judges present a perspective that has not been previously represented. Christine M. Durham, former president of the NAWJ and present Utah Supreme Court Justice, states: "We bring an individual and collective perspective to our work that cannot be achieved in a system which reflects the experience of only a part of the people whose lives it effects."³³⁷

However, the question has arisen as to whether women who achieve the bench have been "socialized" to get along in a male dominated profession and, therefore, act and think in a way established by and acceptable to men. If the law is male, as suggested by a 1993 Symposium,³³⁸ then the profession "has been structured to mesh with the lives of men and the norms of society which encourage men's

336. See, e.g., SANDRA BAXTER & MARJORIE LANSING, *WOMEN & POLITICS: THE VISIBLE MAJORITY* (1983).

337. Christine M. Durham, *President's Column*, NAWJ NEWS AND ANNOUNCEMENTS (vol. 1) (1987), at 1.

338. Symposium: *Is the Law Male?*, 69 CHI.-KENT L. REV. 293 (1993).

commitment to work,"³³⁹ and perhaps women have adopted this role.

If women in law do conform to male norms, it will not matter how many women enter law school or the judiciary. Changes in the practice of law will not come; it will be the same picture and same program with a few more female faces. For women in the judiciary, the question is more dramatic. As judges, women can impact the law itself, not just the practice of law. But the extent of their impact on the law is limited because it is difficult for any judge to implant personal values on the law. Judges work within a structure where decisions are limited by the present system of stare decisis. This system was developed over the years when women had little, if any, part in its development. If women's voices had been a part of the system's development, a different structure might have evolved.

Carol Gilligan argues that women's voices have not been a part of the development of this system.³⁴⁰ The early feminists' were assimilationists and worked to be included in what was then considered the man's world of law.³⁴¹ That approach is changing. Modern feminists say that this type of acceptance is forcing women into a role of "men in skirts," which is not acceptable today.³⁴² Today women should be able to be women and function in roles that were, in the past, only for men.³⁴³

Regarding whether women judges have really been "socialized" or "assimilated" or whether they do make a difference, it is safe to say that the results are not yet in. Professor Elaine Martin of Eastern Michigan University has conducted two studies on this issue. Martin's first study compared experiences of female federal judges appointed by President Carter and male judges.³⁴⁴ She found that men and women had different pre-bench careers that could impact on their decision making process.³⁴⁵ She determined that these differences were related to the different societal roles of men and women.³⁴⁶ For example, one difference she found was that women were significantly less politically active than their male counterparts.³⁴⁷ Similarly, the instant survey of the forty-eight Indiana women judges establishes that thirty-eight of them were minimally or not at all politically active prior to becoming a judge. If political activism, always considered one path to the bench, also impacts on the judicial decision making process, differences may be apparent.

The roles of men and women in the family also impact the pre-bench careers of women. Women carry a heavier burden at home and experience greater conflict

339. CYNTHIA FUCHS EPSTEIN, *WOMEN IN LAW* 8 (1983).

340. Judith Resnick, *On the Bias: Feminist Reconsideration of the Aspirations for our Judges*, 61 S. CAL. L. REV. 1877, 1913 (1988).

341. *Id.*

342. *Id.*

343. *Id.*

344. Elaine Martin, *Women on the Federal Bench: A Comparative Profile*, 65 JUDICATURE 306 (1982).

345. *Id.* at 309-11.

346. *Id.* at 310.

347. *Id.* at 308.

between parental and career roles than do men. In Martin's study, she established that 82% of the men judges studied had spouses who took the major responsibility for running the household.³⁴⁸ In contrast, 9.3% of the women judges had spouses who carried the primary responsibility.³⁴⁹ The dual role and responsibilities of women lawyers and homemakers may have limited the legal and political experience of some women attorneys, thus narrowing the path to the bench and changing the outlook of the women in the process.

Martin extended her study to a comparison of Carter-appointed and Reagan-appointed judges.³⁵⁰ She established that Carter-appointed women were stronger in their support of women in changing social roles than either Carter-appointed men or Reagan-appointed men or women.³⁵¹ She determined this by comparing results of surveys she conducted of men and women judges.³⁵² However, in the process, she became convinced that a definition of behavior that makes a difference had to include more than case decisions. It should also include: 1) women's conduct of courtroom business, especially regarding sexist behavior on the part of litigators; 2) women's influence on sexual attitudes held by their colleagues; and 3) women's behavior as administrators, for example, in the hiring of women law clerks.³⁵³ If these areas of proposed comparisons show a difference between men and women, they may perhaps have little impact on decisions, but they can certainly change the nature of the work place and perhaps the system itself.

Other researchers³⁵⁴ reported that their preliminary research found no major statistically significant gender difference in voting behavior, even on women's issues, but acknowledged that more research with a larger number of both cases and women judges might produce different results.

Martin then surveyed a number of state judges and found that women feminists felt strongly that women have a unique perspective that needs to be represented and that without that representation the bench does not reflect our society.³⁵⁵ Martin also found that both feminist and non-feminist women were significantly more likely than any group of men to perceive that 1) women judges behave differently than men judges; 2) women judges have an ability not possessed by men to bring people together; and 3) women judges face special

348. Elaine Martin, *Men & Women on the Bench: Vive La Difference?*, 73 JUDICATURE 204, 206 (1990).

349. *Id.*

350. Elaine Martin, *Gender and Judicial Selection: A Comparison of the Reagan and Carter Administrations*, 71 JUDICATURE 136 (1987).

351. *Making a Difference: Women on the Bench*, 12 WOMEN'S RTS. L. REP. 255, 260 (Marilyn Loftus, moderator, 1991) (quoting Elaine Martin).

352. *Id.*

353. *Id.* at 261.

354. See, e.g., Gotshall, *Carter's Judicial Appointments: The Influence of Affirmative Action and Merit Selection on Voting on the U.S. Courts of Appeals*, 67 JUDICATURE 165 (1983).

355. *Making a Difference*, *supra* note 351, at 262.

problems in our judicial system.³⁵⁶

Carol Gilligan would certainly agree with Martin. Gilligan, through her research, found that women dealt differently with conflict situations than did men.³⁵⁷ She theorized that this difference may be due to the different experiences of boys and girls while growing up, primarily because boys distance and separate themselves from their mothers because of their gender difference, and girls identify with their mothers and grow in the context of connection.³⁵⁸ It is argued that this difference in development can result in women judges being more conciliatory in their approach to cases and less apt to apply strict rules.³⁵⁹

Along the same lines, Walker and Barrow compared opinions of twelve pairs of women and men federal judges and ten pairs of black and white federal judges.³⁶⁰ One finding was that “[f]emale judges exhibit a much greater tendency to defer to the position taken by government than do male judges.”³⁶¹ Walker and Barrow concluded that “[n]o differences were found on any of [their] measures of judicial quality and acceptance.”³⁶² Women were more deferential than men, and Resnick suggests that perhaps women’s behavior was more appropriate and men were displaying arrogance.³⁶³

Social science researchers Allen and Wall conclude that unconventional women justices, who are the first women to serve on their courts, will be more willing to entertain proposals for major changes in legal doctrine.³⁶⁴ Allen and Wall’s research and analysis of the role orientations of women state supreme court justices provide some support for their conclusion. Allen and Wall use four role orientations to explain the judicial decisions of women state supreme court justices. Those roles are: 1) representative; 2) token; 3) outsider; and 4) different voice.³⁶⁵

Women justices adopting the “representative” role are assumed to incorporate a woman’s viewpoint in legal matters directly impacting on women as a category, such as cases involving damages for sexual assault.³⁶⁶ They perceive themselves as a representative of all women and feel obligated to see that the interests of women are considered.³⁶⁷

356. *Id.*

357. Resnick, *supra* note 340, at 1912.

358. CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT 7-10 (1982).

359. Resnick, *supra* note 340, at 1911-13.

360. Thomas G. Walker & Deborah J. Barrow, *The Diversification of the Federal Bench, Policy and Process Ramifications*, 47 J. POL. 596 (1985).

361. *Id.* at 608.

362. *Id.* at 614.

363. Resnick, *supra* note 340, at 1933.

364. David W. Allen & Diane E. Wall, *Role Orientations and Women State Supreme Court Justices*, 77 JUDICATURE 156, 159 (1993).

365. *Id.* at 158-59.

366. *Id.* at 158.

367. *Id.*

Women justices adopting the "token" role may modify their behavior to conform to the dominant majority and occupy a centrist position on the court.³⁶⁸ In this way, they avoid drawing attention to their gender, the characteristic that sets them off as a minority member of the court, and therefore are given legitimacy.³⁶⁹ A justice in the "token" role would have voting records that lie within the central area of any scale.³⁷⁰

The "outsider" role, an opposite to the "token" role, appears to be adopted by women justices who "are not afraid to deviate from group norms."³⁷¹ Their voting behavior may be comparatively extreme, and they do not moderate, persuade or compromise.³⁷² Instead, they address audiences outside the court.³⁷³ This can be a very demanding role. Researchers Werner and Backtold point to the personality traits of women who "are among the first of their gender to enter a previously all male bastion."³⁷⁴ These are women of high self-esteem, with no fear of deviating from institutional norms, and not constrained by minority status.³⁷⁵ Allen and Wall conclude that these women "justices might be expected to have the emotional and psychological wherewithal to maintain the Outsider role."³⁷⁶

The "different voice" role may be exhibited by women justices who have a different view of morality and place a higher value on relational concerns than their male colleagues.³⁷⁷ Allen and Wall found that women justices of a different voice are generally more likely than men to be the most pro-women members of their court on women's issues, to occupy the extreme liberal or conservative ends of their courts, and to engage in extreme and isolated dissenting behavior in criminal and economic cases.³⁷⁸

After analyzing twenty-four female justices from twenty-one states, Allen and Wall determined that a preponderance of women justices in the study adopted a representative role.³⁷⁹ Strongly pro-women in decision and behavior, the justices saw a broad spectrum of issues as women's issues, such as sex discrimination, sexual conduct and abuse, property settlements, and parent-child issues.³⁸⁰

After studying the Minnesota Supreme Court, the first and only state supreme court to have a majority of women justices, Allen and Wall found that no women

368. *Id.*

369. *Id.* (citing Beverly B. Cook, *Women Judges: The End of Tokenism*, in *WOMEN IN THE COURTS* (Winifred L. Hepple & Laura Crites eds., 1978) (other citations omitted)).

370. *Id.*

371. *Id.* at 158-59.

372. *Id.*

373. *Id.* at 159.

374. *Id.* (citing WERNER & BACKTOLD, *Personality Characteristics and Women in American Politics*, in *WOMEN IN POLITICS* 83 (Jacquette, ed., 1983) (other citations omitted)).

375. *Id.*

376. *Id.*

377. *Id.*

378. *Id.* at 161-62.

379. *Id.* at 161.

380. *Id.*

on the court adopted the token role orientation.³⁸¹ Also, on criminal cases three of the four women were outsiders, but none of the men were.³⁸² On the economic liberties scale, two women and one man were outsiders.³⁸³ Only one woman on each scale (one liberal and one conservative) and one man demonstrated a different voice on the economics liberties scale.³⁸⁴

The 1991 appointment of Justice Sandra Gardebring to the Minnesota Supreme Court created the four to three female majority studied by Allen and Wall and made news throughout the nation. David Margolick wrote for the *New York Times* that this was the first powerful legal institution dominated by women and stated:

No one is predicting that the new female majority on the seven member Minnesota Court will instantly produce changes in its jurisprudence, though some lawyers anticipate heightened sensitivity to cases involving domestic abuse, child custody, spousal support, sexual harassment, employment discrimination and other issues of traditional concern to women.³⁸⁵

Minnesota Justice Rosalie Wahl, the first woman on the Minnesota Supreme Court, while speaking at the Chicago-Kent College of Law Women's Legal Studies Institute in July 1994, said the news article was misleading in two regards. She stated that:

First, we don't want to make instant changes in our jurisprudence—only significant ones—and those in a principled way in the proper time and case. And, second, we haven't dominated the court, we haven't wanted to. We only want our values and the law to relate in a way that will do Justice—to the law and to the people that law serves.³⁸⁶

Justice Wahl retired from the Minnesota Supreme Court in August 1994, and her position was filled by a man.³⁸⁷ Thus ended the only female majority on any state supreme court. Justice Wahl believes that, while the Minnesota female majority is gone, we now know it is possible for women to be the majority on a state supreme court and that other states may follow.³⁸⁸ She said: "My experience is that the presence of one woman alone on a court—one person of color—one differently abled person—heightens awareness, broadens perspective, begins to

381. *Id.* at 162.

382. *Id.*

383. *Id.*

384. *Id.* at 159-162.

385. David Margolick, *Women's Milestone: Majority on Minnesota Court*, N.Y. TIMES, Feb. 22, 1991, at B16.

386. Rosalie E. Wahl, Address at the Chicago-Kent College of Law Women's Legal Studies Institute, *Living the Life of a Woman Judge* (July 23, 1994) (unpublished manuscript, on file with Justice Wahl).

387. *Id.*

388. *Id.*

change direction in some way. But *numbers* make a *difference*.”³⁸⁹

VIII. HAVE WOMEN JUDGES MADE A DIFFERENCE IN INDIANA?

Do the Indiana judges believe they have made a difference as Justice Wahl suggests? Thirty-eight (88%) of the women judges responded with a resounding “yes.” Those responding negatively were primarily judges who were very new to the bench. However, one long-time judge responded that she did not feel she had made a difference and was running out of energy to keep trying. Some felt they had chosen a profession that did not want them and therefore suffered from their choice.

However, a common thread among the Indiana women is that each felt she helped to make the path easier for the women coming behind her on the bench. Judge Barker stated: “I’ve been the first one through the door on several occasions now, and I am very attentive to the needs of those who are coming after me. I have been alert all along to this special visibility I have had and the responsibility it imposes on me.” Judge Barteau said that even though her own career path has been full of head winds, she believes the fact that she has spent more than twenty years on the bench has removed many obstacles for other women. Judge Boyer believes that her biggest contribution has been opening up the private practice to women in her Fort Wayne area. Judge Gray said, “My presence in court alone helps women attorneys *and* male attorneys overcome barriers. My working hard and doing my job well has helped other women in whatever field of interest they have had.” Judge Jimison said, “I tried to bring a type of respect for all who came to the court, whether victim or wrongdoer. Humanity demands respect—especially fallen humanity.” Judge Reichard believes that she has personally made a difference on the system because of the responses she has had from other attorneys, and from defendants and victims. She further states:

I also know that as a woman my age I owe a great deal to the generation of women who came before me and who had to endure a lot more discrimination, outright hostility, etc., than I have had to. They made it easier for me and I hope that I, in turn, am making it easier on the next generation of women in the legal profession.³⁹⁰

Only four women thought that the increase in the number of women judges and lawyers had failed to make a systemic difference. One tongue in cheek response was that a major difference is there are now longer lines at the ladies’ rooms at judicial conferences. All believed that it helps to have other women to talk to concerning the experiences of women on the bench and that it is no longer fashionable to be discriminatory.

Indiana women judges have brought a diverse and positive approach to the practice of law and to the judiciary. Because many of the women judges are married and raising children, the system has been forced to become a little more

389. *Id.*

390. Questionnaires, *supra* note 2.

flexible. The realities of child support and child care impact the highest officer of the court. One judge stated that “the increase in the number of women judges and lawyers has made a difference in the expectations of our children and in the dispensation of Justice. We are enriched by the attitudes, aptitudes and interest of women.” Another mentioned, “every accomplished woman judge and lawyer adds to the likelihood that we will see real gender neutrality in our lifetime.” One judge said:

Only now—when there are more women in the legal profession—are issues like child abuse, domestic violence, homelessness and so forth being addressed in any serious systemic fashion Men have been on the bench for centuries and have dominated the bench in this century for at least the first seven or eight decades, but as numbers of women increase, sticky societal problems are actually getting the attention they deserve.³⁹¹

As Judge Vaidik suggested, perhaps the most simple change, but one so important, is that our judicial system is simply more credible when the judges and advocates are from diverse backgrounds.

Even those that believe they have made an impact on the system, still believe that the “good ole boy network” is alive and well, but perhaps a little more subtle than before. One judge indicates that more men are accepting the notion that women can be capable judges and attorneys, but the network is still there and active. A relatively new judge with several years of legal experience said:

At the beginning of my legal career, women lawyers, including me, fought hard to be one of the few women accepted by the good ole boys. Now, a good ole girls’ network has been established and women are more often a part of the girls’ network as opposed to the boys’ network, by choice.³⁹²

However, when asked if their closest ties were to men or women judges, thirty-one judges (67%) indicated that it was either to men or to both men and women. These judges almost uniformly expressed that the reason for their ties was because most of the judges in their communities are male, while the women were scattered throughout the state.³⁹³ Those indicating that their closest ties were with female judges said, “The female judges allow you to bare your soul to them. The men judges would just as soon you not get too personal about things beyond work.” One indicated, “I like the social company and concerns of women—even women judges—better than male judges.” Another indicated that although she is close to both men and women judges, she has more in common with the women judges.

Because thirty-three of Indiana’s women judges were traveling a path in their

391. *Id.*

392. *Id.*

393. See Map of State of Indiana Showing Distribution of Women Judges, *infra* Appendix D.

counties that had not been previously traversed by women, all were asked if they felt that they had personally changed since becoming a judge. Nine (20%) of the women answered "no," without any explanation, but thirty-six (80%) women answered "yes." Of the latter, a majority answered that they had become wiser and more knowledgeable, even about things in which they had little interest. They are more distressed about what is happening to families. Many of the women indicated that they had become more cynical and less trusting of others since going on the bench. Others indicated that they were more confident of themselves as a person once they had proven that they could meet the challenge of the bench, but they became more aware of their weaknesses and humanity than they had been prior to the bench. A few, with tongue in cheek, said that they had changed by becoming heavier, by as much as thirty pounds, since they had begun this sedentary job.

One common thread among the women seemed to be the fact that they felt more alone. One said:

I was not prepared for the isolation, the loneliness of the job. You have to be so careful about discussing cases with anyone else, so the burden is[,] in the end, only yours to bear. You must make decisions affecting people's families and lives and it is a very solemn, sobering task, one that you want to do well, you want to do Justice. Instead . . . you have to move the calendar and can barely think straight. I read one judge's words describing her job as something like 'exquisite torture,' and I know exactly how she feels. I have come to value my friends and family more than ever and I have learned much about human nature.³⁹⁴

For a number of years, Indiana's women judges have met at least once, sometimes twice, a year in a retreat. This has created an Indiana network of women judges. The network is not in opposition to anything and has not established objectives and goals as has the NAWJ, but it is simply to help understand the humanness of one another and to support each other in personal goals. "We are not against the male establishment," as Judge Cole says, "we just want to be included." The network created by the retreat helps alleviate this feeling of isolation and exclusion.

IX. CONCLUSION

Do women judges make a difference? "Sometimes, some women do." A comparative study made of the Ninth Circuit does not support the theory that women judges will change the very nature of the law.³⁹⁵

But perhaps we should not be asking "will women judges make a difference," but instead "will women judges change the law or be changed by it?" If the women assuming the bench do no more than operate by the rules and structure established by the men, then they shall do no more than increase the numbers of

394. Questionnaires, *supra* note 2.

395. Sue Davis, *Do Women Judges Speak "In a Different Voice?"* Carol Gilligan, *Feminist Legal Theory, and the Ninth Circuit*, 8 WIS. WOMEN'S L.J. 143, 171 (1993).

women in the judiciary. The increase in numbers is, in itself, important. For, once the judiciary is changed to reflect the fabric of society, it will be more acceptable to society, which encompasses the persons who deal with courts. Almost every woman judge can tell you of an experience where a woman litigant, juror, or lawyer has told them how good it is to see a woman presiding in the courtroom. The women judges make the women participants feel more comfortable and feel as if their gender is more credible.

But, unless women bring something new to the bench, a court that physically resembles the fabric of society is all we can expect. Discrimination in achieving the bench will disappear, but the result will be only more judges that are women, not judges that bring about change or something new to the law.

It has been suggested that this is in fact what is happening, that women lawyers are being assimilated into the traditional culture of the profession, rather than bringing innovation.³⁹⁶ It is further suggested that women judges, even more than women lawyers, are being assimilated into the culture of a judge.³⁹⁷ These suggestions may be true, but a transformation of the system may come about simply by virtue of increased numbers because, as Justice Wahl stated, "Numbers are important."³⁹⁸

If greater numbers of women judges do bring about a transformation, it will, of necessity, be slow because all women are not the same and do not have the same personal or political experiences and beliefs. Further, in a judicial decision even when a woman expresses and considers values and interests thought to be unique to women, she may still reach the same decision as a man. However, even if the same decision is reached, it is important that women's perspectives be considered in reaching the decision. This in itself can be a change.

Areas exist where an increased number of women judges may strongly impact the law. Because of the familial responsibilities still hovering in the women's realm, women may bring changes to the work place that will make it more hospitable to families. Because of their history in experiencing discrimination, perhaps women will make and enforce laws that promote more equal treatment of everyone. Because of women's sense of connection to others as described in Carol Gilligan's work,³⁹⁹ perhaps they can change the adversarial system to one less damaging to participants.

Small changes have already been made. When Sandra Day O'Connor was nominated to the U.S. Supreme Court, the first change was simple. The proper address for a member of the U.S. Supreme Court became simply "Justice," not "Mr. Justice." Justice O'Connor also helped bring about the simple change of elimination of gender biased language from the U.S. Code.⁴⁰⁰

396. Carrie Menkel-Meadow, *Portia in a Different Voice: Speculation on a Woman's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39, 42 (1985).

397. Davis, *supra* note 395, at 172.

398. Wahl, *supra* note 386.

399. CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982).

400. Stephen J. Wermiel, *O'Connor: A Dual Role—An Introduction*, 13 WOMEN'S RTS. L.

The presence of women judges in Indiana has brought about simple changes to the system. The men litigators have almost stopped calling them "sir" in open court. The frequency of being told that they "don't look like a judge" is smaller in the thirty-three Indiana counties that have had a woman judge. Women judges have become great enough in number that it is no longer news when a woman assumes a bench. Women judges' decisions are now more apt to bring comment because of the legal content rather than because of the gender of the judge.

However important these small changes are, Indiana women judges have also been instrumental in making major changes to the system. Almost all of the women have been activists on the bench. By creating programs in their counties, they have shifted the focus in drug and alcohol violations from punishment to treatment.⁴⁰¹ Because of their special interest in children, they have consistently made changes in the numbers and kinds of programs for juveniles and first-time offenders.⁴⁰² They established Alternate Dispute Resolution (ADR) programs, even before Indiana adopted ADR rules.⁴⁰³ They have initiated court-based counseling and mediation programs to gently close the book on marriages that are dissolving and to assist in the resolution of custodial issues.⁴⁰⁴ Family violence, literacy, parenting, and inmate General Education Degree (GED) programs have been addressed by the women judges, usually for the first time in their jurisdictions.⁴⁰⁵ The Indiana Court of Appeals was computerized because of Judge

REP. 129, 132 (1991).

401. For example, Judge Chezem established the first court-based alcohol and drug services in Indiana to be certified by the Indiana Division of Addiction Services and she established the first treatment alternatives to a street crime program directed toward offenders with substance abuse problems. *See Chezem, infra* Appendix C. Judge Gray established an educational program for prevention, intervention, and education to reduce alcohol and drug abuse and established a drug and alcohol abuse education program at the Indiana State Farm. *See Gray, infra* Appendix C. Judge Jourdan initiated a court-administered alcohol program in St. Joseph County which evaluates persons convicted of drunk driving, placing some in community treatment programs and others in educational programs. Judge Jourdan also coordinated efforts to develop a comprehensive criminal justice plan for drug offenders in her county which resulted in the establishment of a drug court and a treatment program for indigents under court supervision. *See Jourdan, infra* Appendix C.

402. Questionnaires, *supra* note 2. Biographies, *infra* Appendix C. Judge Barthold established, for the first time in her county, a 24-hour juvenile in-take program. Judge Chezem established juvenile caseworkers for the first time in her county, and Judge Austin has organized a youth shelter for juvenile offenders. *Id.*

403. Judge Barteau established a mediation program in the Marion County, Indiana, Domestic Relations Counseling Bureau in the late 1970s. Both Judge Comer and Judge Kenworthy initiated mediation programs in family disputes in their counties. *Id.*

404. Judge Barteau was instrumental in establishing a court-connected custody evaluation and counseling program for the benefit of the families and judges in divorce court. Judge Hand was instrumental in the domestic relations task force for her county. Judge Jourdan established a domestic relations counseling bureau in her county. *Id.*

405. Judge Barthold established a parenting family focus project to assist families. Judge McNaghy was instrumental in establishing G.E.D. programs and literacy training for the first time

Chezem's chagrin when she was appointed to the court and found one computer being rolled back and forth among the three judges of her district. She wrote for and obtained grants providing for the purchase of computers and the necessary technical assistance for the entire court.⁴⁰⁶ The women in the judiciary throughout Indiana were instrumental in establishing programs that benefitted their particular neighborhoods.⁴⁰⁷

Imbued in Indiana women judges bent for judicial activism is a sense that they are role models for the future generation of women. They actively participate in and create community educational programs for young people.

A view of the judicial biographies of the Indiana women judges⁴⁰⁸ clearly establishes that each has had an impact and been an agent of change in the county where she serves. And, by participation in the Indiana Judges Association, the women are putting their imprint on the development of Indiana by being a part of its growth and development. Finally, by their visibility in their communities, the judges are bringing the judiciary within reach of an entirely new generation of women, and, hopefully, a more representative view of the judiciary to citizens in Indiana.

ever in the county where she presided. *Id.*

406. When Judge Chezem was a county court judge, she established the first of its kind computer link between the court, the Indiana State Police, and the Indiana Bureau of Motor Vehicles. Judge McNagny was instrumental in the computerization of the courts in her county. *Id.*

407. Judge Barthold established programs for liaison between the courts and the schools. She also established a neighborhood complaint program where citizens could bring their complaints to the court. Judge Jourdan established a program to combat violence in the community and a community residential correction facility. Judge McNagny established a community residential correction facility. Judge Smith was instrumental in establishing a leadership program for young people. Judge Barteau organized an Adopt-A-School program where a judge was assigned to every middle school in Marion County, Indiana. Judge Stewart was active in the Guardian Ad Litem program. Judge Hand was active in Court Appointed Special Advocates (CASA) for her community. Judge Barthold got volunteers from her community to act as probation officers when there were insufficient officers for the offenders. Judge Gray was instrumental in establishing alternatives to prison for non-violent offenders in her community, as was Judge McNagny in establishing counseling programs for non-violent offenders in her community. Judge Vaidik, prior to assuming the bench, was active in establishing a victims' assistance program and a sexual assault prevention program for her county. *Id.*

408. *Id.*

ADDENDUM

In February of 1995, the women judges of Indiana met at their annual retreat. Portions of this Article were made available to the women in attendance. During the organization of the retreat, it was decided to have a woman psychologist address the group on problems that professional women have in competing in a world that is dominated by men. Dr. Diane Brashear of Indiana University School of Medicine was gracious enough to agree to attend the meeting and make a presentation. A draft of the section containing the profile of Indiana women judges was sent to Dr. Brashear prior to the meeting so that she could become familiar with the statistics about the Indiana women jurists. Her comments are as follows:

I write to comment on the study of women judges in Indiana obtained by Judge Betty Barteau for her thesis. This material was used in a seminar of Indiana women judges on February 11, 1995. As the leader of the seminar, I found the information from the study most relevant and helpful in my preparation as well as providing information to the group. My mission for this seminar was to present and discuss factors that had social and psychological impact for these women. The data, obtained by Judge Barteau, was particularly helpful. Some respondents gave specific experiences which were noted in Judge Barteau's notes. This information gave me direction as to what these women had experienced and therefore allowed me to plan and present material about professional women within the framework of what female judges experience. In addition, the data gave important information about the personal impact of being appointed to the bench: for example, the fact that twenty-five percent of these women became divorced after they took the bench. This information signaled to me the importance of discussing gender differences in terms of communication and personal achievement. More importantly, the individual responses from the participants again provided information that validated others' experiences. These individual remarks were anecdotal but most relevant in my discussion of issues of credibility, gender difference in respect to authority and validating what many of the participants had experienced.

For example, with respect to credibility, it has been noted that many professional women in leadership positions are not taken seriously or are monitored more closely as to how they dress, spend their time, etc. Although this is known in business and some professions, it is not documented for women judges, a significant leadership position in law. Very specific examples gave many of the seminar participants [an] opportunity to identify their own experiences and share those in discussion. These common experiences helped the group members become more mutually supportive. It also offered an opportunity for them to reframe these experiences in such a way as to enable them to respond to the situation more positively and assertively.

Professional women, especially those in leadership positions, are often isolated socially and emotionally from their female peers. This group offers a positive resource to women judges and I think will be most helpful over time. . . .⁴⁰⁹

The profile of Indiana women judges was given to a woman judge and a man judge for their comment. Another commentary was from a man judge who has been a member of the judiciary at various levels for over nineteen years. He believes that a comparative cohort study would be of interest. He would like to know the extent to which the increasing number of women judges and, for that matter, the increasing number of women lawyers is affecting the male judiciary in making them advocates of some of the same issues that this Article suggests are typically endorsed by women judges and lawyers.

Because his judicial experience parallels the period of time when women began to assume an increasing presence on the bench, he agrees with the conclusion of this Article that women may reach the same decisions of men, but they may get there through utilization of a different perspective. He shares that he was naively shocked at some of the quotes attributable to the women judges on the bench when they were called upon to share how they were originally, and now continue to be, accepted on the bench and treated by male peers.

Judge Chezem, who has served on the bench since 1976, also commented on the profile section of the Article. She stated:

As I read *A Profile of Indiana Women Who Have Made the Arduous Climb* I began to feel almost tearful. I was not sad but a well of feeling from deep within me began to rise as I realized that, for the first time a voice was describing twenty years of my life. I read the numbers and descriptions and saw my life in those lines. I relived the most challenging and rewarding part of my life and broke through a denial of the fear and anger I had suppressed in order to be a white man's judge. I have loved the people for whom and with whom I have worked in the court system and have not given voice to the power of love in serving the people of Indiana. I did not want to be soft.

I have not talked about the satisfaction I felt in my work, especially, with young people. Yet, both my children have grown up in my work. I have taken them as toddlers to county council meetings and to other meetings. They have been in my court room and office as though I were merely cooking dinner. I wanted them to know that I loved them and they were a part of my work. I wanted them to know what I could not explain about work as a part of a whole and healthy life.

Even though my experiences have been different from some of those reported, they are a part of that history. What we still have not fully given

409. Letter from Diane Blake Brashear, Ph.D., Indiana University School of Medicine, to Betty Barteau, Judge, Indiana Court of Appeals (Mar. 28, 1995) (on file with author).

voice to is the toll of those battles to take the women's presence beyond that of token visibility. Perhaps it will take retirement before some of us are willing to risk our "credibility" as professionals and speak openly about the challenges in a paternalistic addicted legal system.⁴¹⁰

410. Letter from Honorable Linda L. Chezem, Judge, Indiana Court of Appeals, to Betty Barteau, Judge, Indiana Court of Appeals (Mar. 30, 1995) (on file with author).

APPENDIX A
ALPHABETICAL SUMMARY OF WOMEN JUDGES

<u>Judge</u>	<u>Law School/ Year of Graduation</u>	<u>County</u>	<u>Years of Service</u>	<u>Court</u>
Maryland L. Austin	Arizona State University 1979	Harrison- Crawford	1981-1984	Harrison-Crawford County Court
Cynthia J. Ayers	I.U. Indianapolis 1982	Marion	1991-	Marion Superior Court Civil Division, Room 4
Sarah Evans Barker	I.U. Bloomington 1965	Marion	1984-	United States District Court, Southern District of Indiana
Betty Scales Barteau	I.U. Indianapolis 1965	Marion	1975-1990	Marion Superior Court Civil Division, Room 3
Clementine B. Barthold	I.U. Indianapolis 1980	Clark	1991- 1983-1994	Indiana Court of Appeals Clark Superior Court
Mary Beth Bonaventura	Northern Illinois University 1981	Lake	1993-	Lake Superior Court Juvenile Division
Nancy Eshcoff Boyer	I.U. Indianapolis 1976	Allen	1991-	Allen Superior Court
Ronda R. Brown	Valparaiso University 1989	Parke	1993-	Parke Circuit Court
Rosemary Higgins Burke	University of Notre Dame 1992	Fulton	1993-	Fulton Superior Court
Linda L. Chezem	I.U. Bloomington 1971	Lawrence	1976-1982 1982-1988 1988-	Lawrence County Court Lawrence Circuit Court Indiana Court of Appeals

APPENDIX A

ALPHABETICAL SUMMARY OF WOMEN JUDGES

<u>Judge</u>	<u>Law School/ Year of Graduation</u>	<u>County</u>	<u>Years of Service</u>	<u>Court</u>
Betty L. (McDonel) Shelton Cole	I.U. Indianapolis 1969	Delaware	1980-1984 1985-	Delaware County Court Delaware Superior Court Room 3
Mary Lee Comer	I.U. Indianapolis 1981	Hendricks	1983-	Hendricks Superior Court Room 1
Antoinette Antonellis Cordingly`	Suffolk University 1971	Marion	1979-1992	Marion Municipal Court Criminal Division, Room 10
Jane Spencer Craney	I.U. Indianapolis 1979	Morgan	1991-	Morgan County Court
Suzanne Trautman Dugan	I.U. Bloomington 1982	Bartholomew	1987-1991	Bartholomew Circuit Court
Judith Hayes Dwyer	I.U. Bloomington 1963	Daviess	1976-1987 1988-	Daviess County Court Daviess Superior Court
Elaine B. Elliott	I.U. Bloomington 1982	Dubois	1987-	Dubois Superior Court
Cynthia S. Emkes	I.U. Indianapolis 1985	Johnson	1987-	Johnson Superior Court Room 2
Patricia J. Gifford	I.U. Indianapolis 1968	Marion	1979-	Marion Superior Court Criminal Division, Room 4
Sally H. Gray	I.U. Indianapolis 1979	Putnam	1981-	Putnam County Court

ALPHABETICAL SUMMARY OF WOMEN JUDGES

<u>Judge</u>	<u>Law School/</u>		<u>County</u>	<u>Years of Service</u>	<u>Court</u>
	<u>Year of Graduation</u>				
Margaret J. Hand	I.U. Indianapolis 1978		Tippecanoe	1986-	Tippecanoe Superior Court Room 3
Barbara Arnold Harcourt	I.U. Indianapolis 1987		Rush	1989-	Rush Circuit Court
Mary Rudasics Harper	Valparaiso University 1974		Porter	1985-1986 1986-	Porter County Court Porter Superior Court Room 3
Susan Hay Hemminger	Valparaiso University 1983		LaPorte	1991-1993	LaPorte Superior Court Room 4
Kelley B. Huebner	I.U. Indianapolis 1979		Martin	1987-1992	Martin Circuit Court
Z. Mae Jimison	Ohio State College 1977		Marion	1988-1990	Marion Superior Court Criminal Division, Room 6
Jeanne Jourdan	University of Notre Dame 1975		St. Joseph	1981-	St. Joseph Superior Court
Phyllis Schramm Kenworthy	I.U. Bloomington 1981		Monroe	1987-1990	Monroe Superior Court Rooms III & V
Diana LaViolette	I.U. Indianapolis 1980		Putnam	1993-	Putnam Circuit Court
Paula E. Lopossa	I.U. Indianapolis 1973		Marion	1991-	Marion Superior Court Criminal Division, Room 1

ALPHABETICAL SUMMARY OF WOMEN JUDGES

<u>Judge</u>	<u>Law School/</u> <u>Year of Graduation</u>	<u>County</u>	<u>Years of</u> <u>Service</u>	<u>Court</u>
Elizabeth N. Mann	I.U. Bloomington 1976	Monroe	1989-	Monroe Circuit Court Division IV
Patricia Ann McNagny	I.U. Bloomington 1951	Whitley	1983-1984 1985-1991	Whitley County Court Whitley Superior Court
Mary Louise McQueen	I.U. Indianapolis 1979	Shelby	1991-	Shelby Superior Court Room 2
Darlene Wanda Mears	Valparaiso University 1971	Lake	1978-1992	Lake Superior Court Juvenile Division
Heather M. Mollo	I.U. Bloomington 1983	Brown	1993-	Brown Circuit Court
Sheila Marie Moss	Valparaiso University 1981	Lake	1993-	Lake Superior Court County Division, Room 2
Judith S. Proffitt	I.U. Indianapolis 1971	Hamilton	1983-	Hamilton Circuit Court
Ruth Diane Reichard	I.U. Indianapolis 1985	Marion	1991-	Marion Municipal Court Criminal Division, Room 16
Patricia Ann Woodworth Riley	I.U. Indianapolis 1974	Jasper	1990-1993	Jasper Superior Court Room 2
Vivian Sue Shields	I.U. Bloomington 1961	Hamilton	1994- 1965-1978 1978-1994 1994-	Indiana Court of Appeals Hamilton Superior Court Indiana Court of Appeals United States District Court, Southern District of Indiana

APPENDIX A
ALPHABETICAL SUMMARY OF WOMEN JUDGES

<u>Judge</u>	<u>Law School/</u>	<u>County</u>	<u>Years of</u>	<u>Court</u>
	<u>Year of Graduation</u>		<u>Service</u>	
Kathy R. Smith	I.U. Indianapolis	Clinton	1983-1990	Clinton County Court
	1980		1990-	Clinton Superior Court
Eleanor Bankoff Stein	New York University	Howard	1981-1989	Howard County Court
	1949			
Judith A. Stewart	I.U. Indianapolis	Brown	1991-1993	Brown Circuit Court
	1982			
Olga Hulewicz Stickel	I.U. Bloomington	Elkhart	1984-	Elkhart County Court
	1976			
Elizabeth Ward Hammond	University of			
Swarens	Louisville	Crawford	1987-1992	Crawford Circuit Court
	1981			
Susan Macey-Thompson	I.U. Bloomington	Marion	1993-	Marion Municipal Court
	1980			
Nancy Harris Vaidik	Valparaiso University	Porter	1993-	Porter Superior Court
	1980			Room 4
Lisa M. Traylor-Wolff	Valparaiso University	Fulton-	1991-1993	Fulton-Pulaski County
	1986	Pulaski		Court
			1993-	Pulaski Superior Court

CHRONOLOGICAL SUMMARY OF WOMEN JUDGES

<u>Judge</u>	<u>Law School/</u> <u>Year of Graduation</u>	<u>County</u>	<u>Years of</u> <u>Service</u>	<u>Court</u>
Vivian Sue Shields	I.U. Bloomington 1961	Hamilton	1965-1978 1978-1994 1994-	Hamilton Superior Court Indiana Court of Appeals United States District Court, Southern District
Betty Scales Barteau	I.U. Indianapolis 1965	Marion	1975-1990	Marion Superior Court Civil Division, Room 3
Linda L. Chezem	I.U. Bloomington 1971	Lawrence	1991- 1976-1982 1982-1988	Indiana Court of Appeals Lawrence County Court Lawrence Circuit Court
Judith Hayes Dwyer	I.U. Bloomington 1963	Daviess	1988- 1976-1987	Indiana Court of Appeals Daviess County Court
Darlene Wanda Mears	Valparaiso University 1971	Lake	1988- 1978-1992	Daviess Superior Court Lake Superior Court
Patricia J. Gifford	I.U. Indianapolis 1968	Marion	1979-	Juvenile Division Marion Superior Court Criminal Division, Room 4
Antoinette Antonellis Cordingly	Suffolk University 1971	Marion	1979-1992	Marion Municipal Court Criminal Division, Room 10
Betty L. (McDonel) Shelton Cole	I.U. Indianapolis 1969	Delaware	1980-1984 1985-	Delaware County Court Delaware Superior Court Room 3
Maryland L. Austin	Arizona State University 1979	Harrison- Crawford	1981-1984	Harrison-Crawford County Court

CHRONOLOGICAL SUMMARY OF WOMEN JUDGES

<u>Judge</u>	<u>Law School/</u>		<u>County</u>	<u>Years of</u>	
	<u>Year of Graduation</u>	<u>City</u>		<u>Service</u>	<u>Court</u>
Eleanor Bankoff Stein	New York University 1949	Howard		1981-1989	Howard County Court
Sally H. Gray	I.U. Indianapolis 1979	Putnam		1981-	Putnam County Court
Jeanne Jourdan	University of Notre Dame 1975	St. Joseph		1981-	St. Joseph Superior Court
Clementine B. Barthold	I.U. Indianapolis 1980	Clark		1983-1994	Clark Superior Court
Mary Lee Comer	I.U. Indianapolis 1981	Hendricks		1983-	Hendricks Superior Court Room 1
Patricia Ann McNagy	I.U. Bloomington 1951	Whitley		1983-1984 1985-1991	Whitley County Court Whitley Superior Court
Kathy R. Smith	I.U. Indianapolis 1980	Clinton		1983-1990 1990-	Clinton County Court Clinton Superior Court
Judith S. Proffitt	I.U. Indianapolis 1971	Hamilton		1983-	Hamilton Circuit Court
Sarah Evans Barker	I.U. Bloomington 1965	Marion		1984-	United States District Court, Southern District of Indiana
Olga Hulewicz Stickel	I.U. Bloomington 1976	Elkhart		1984-	Elkhart County Court
Mary Rudasics Harper	Valparaiso University 1974	Porter		1985-1986 1986-	Porter County Court Porter Superior Court Room 3

APPENDIX B
CHRONOLOGICAL SUMMARY OF WOMEN JUDGES

<u>Judge</u>	<u>Law School/ Year of Graduation</u>	<u>County</u>	<u>Years of Service</u>	<u>Court</u>
Margaret J. Hand	I.U. Indianapolis 1978	Tippecanoe	1986-	Tippecanoe Superior Court Room 3
Elaine B. Elliott	I.U. Bloomington 1982	Dubois	1987-	Dubois Superior Court
Suzanne Trautman Dugan	I.U. Bloomington 1982	Bartholomew	1987-1991	Bartholomew Circuit Court
Kelley B. Huebner	I.U. Indianapolis 1979	Martin	1987-1992	Martin Circuit Court
Phyllis Schramm Kenworthy	I.U. Bloomington 1981	Monroe	1987-1990	Monroe Superior Court Rooms III & V
Elizabeth Ward Hammond Swarens	University of Louisville 1981	Crawford	1987-1992	Crawford Circuit Court
Cynthia S. Emkes	I.U. Indianapolis 1985	Johnson	1987-	Johnson Superior Court Room 2
Z. Mae Jimison	Ohio State College 1977	Marion	1988-1990	Marion Superior Court Criminal Division, Room 6
Barbara Arnold Harcourt	I.U. Indianapolis 1987	Rush	1989-	Rush Circuit Court
Elizabeth N. Mann	I.U. Bloomington 1976	Monroe	1989-	Monroe Circuit Court Division IV

APPENDIX B

CHRONOLOGICAL SUMMARY OF WOMEN JUDGES

<u>Judge</u>	<u>Law School/ Year of Graduation</u>	<u>County</u>	<u>Years of Service</u>	<u>Court</u>
Patricia Ann Woodworth Riley	I.U. Indianapolis 1974	Jasper	1990-1993	Jasper Superior Court Room 2
Cynthia J. Ayers	I.U. Indianapolis 1982	Marion	1994- 1991-	Indiana Court of Appeals Marion Superior Court
Jane Spencer Craney	I.U. Indianapolis 1979	Morgan	1991-	Civil Division, Room 4 Morgan County Court
Susan Hay Hemminger	Valparaiso University 1983	LaPorte	1991 - 1993	LaPorte Superior Court Room 4
Paula E. Lopossa	I.U. Indianapolis 1973	Marion	1991-	Marion Superior Court Criminal Division, Room 1
Mary Louise McQueen	I.U. Indianapolis 1979	Shelby	1991-	Shelby Superior Court Room 2
Ruth Diane Reichard	I.U. Indianapolis 1985	Marion	1991-	Marion Municipal Court Criminal Division, Room 16
Judith A. Stewart	I.U. Indianapolis 1982	Brown	1991-1993	Brown Circuit Court
Lisa M. Traylor-Wolff	Valparaiso University 1986	Fulton- Pulaski	1991-1993	Fulton-Pulaski County Court
Nancy Eshcoff Boyer	I.U. Indianapolis 1976	Allen	1993- 1991-	Pulaski Superior Court Allen Superior Court

APPENDIX B

CHRONOLOGICAL SUMMARY OF WOMEN JUDGES

<u>Judge</u>	<u>Law School/ Year of Graduation</u>	<u>County</u>	<u>Years of Service</u>	<u>Court</u>
Ronda R. Brown	Valparaiso University 1989	Parke	1993-	Parke Circuit Court
Diana LaViolette	I.U. Indianapolis 1980	Putnam	1993-	Putnam Circuit Court
Susan Macey-Thompson	I.U. Bloomington 1980	Marion	1993-	Marion Municipal Court
Nancy Harris Vaidik	Valparaiso University 1980	Porter	1993-	Porter Superior Court Room 4
Sheila Marie Moss	Valparaiso University 1981	Lake	1993-	Lake Superior Court
Mary Beth Bonaventura	Northern Illinois University 1981	Lake	1993-	County Division, Room 2 Lake Superior Court Juvenile Division
Rosemary Higgins Burke	University of Notre Dame 1992	Fulton	1993-	Fulton Superior Court
Heather M. Mollo	I.U. Bloomington 1983	Brown	1993-	Brown Circuit Court

APPENDIX C

BIOGRAPHIES OF WOMEN JUDGES (CHRONOLOGICAL ORDER)

VIVIAN SUE SHIELDS

Judge of the Hamilton Superior Court

January 1, 1965 - June 30, 1978

Judge of the Indiana Court of Appeals

July 1, 1978 - January 28, 1994

United States Magistrate Judge,

United States District Court

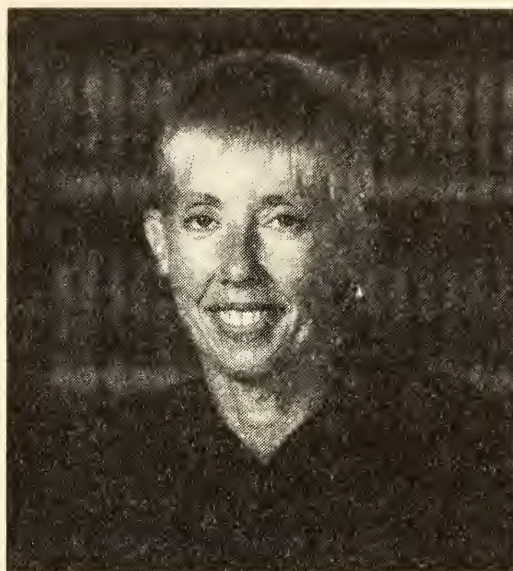
Southern District

January 28, 1994 - To Date

Term Expires: January 28, 2002

D.O.B.: January 17, 1939

Republican



Vivian Sue Shields, in 1964, at the age of twenty-five, was elected to the Hamilton Superior Court and became the first woman to sit as a trial judge on a court of record in the State of Indiana.

Judge Shields was a military child and attended high school in both Germany and the United States before graduating from New Palestine High School in New Palestine, Indiana. She is a 1958 Honors Graduate of Ball State University in Muncie, Indiana, and a 1961 Honors Graduate of Indiana University School of Law—Bloomington. While in law school, Judge Shields was named to the Order of the Coif and was a member of the *Indiana Law Journal*. She and her husband, Bill Shields, an attorney, were married on September 30, 1961, and they are the parents of two sons, of whom one is an attorney and the other is in law school.

Immediately after law school, Judge Shields went to work as counsel for the Internal Revenue Service. From 1962 through 1964, she was employed as a Deputy Attorney General for the State of Indiana. In 1964, Judge Shields decided to run for judge to generate publicity for the fact that she and her husband were opening a law office. She defeated a male opponent in the 1964 primary election and did not have opposition in the November election. She was elected to the Superior Court of Hamilton County and served from 1965 to 1978. She did not have opposition at any time that she ran for re-election.

In 1977, Judge Shields was one of the three nominees for a vacancy on the Indiana Supreme Court, but she was not appointed. She is believed to be the first woman nominated for that position. Subsequently, Governor Otis R. Bowen appointed her to the Indiana Court of Appeals, effective July 7, 1978, and she ran in retention elections to maintain her position. In February of 1994, Judge Shields

was appointed to her present position as an U.S. Magistrate Judge for the U.S. District Court, Southern District of Indiana. She was the first woman to serve in Indiana on a superior court, on the court of appeals, and as a U.S. Magistrate Judge in Indiana.

During Judge Shields' judicial career, she has been extraordinarily active in improving the administration of justice. She has been a member of the Judicial Administration Committee of the Indiana Judges Association, Co-Chairing an in-depth study of the Indiana Judicial System with recommendations on judicial reorganization, sentencing guidelines and child support guidelines. She was a member of the Benchbook Committee of the Indiana Judges Association, publishing a handbook establishing uniformity in judicial procedures. She was a member of the Trial, Sentencing, and Appeal Section of the Indiana Lawyers Commission, which, after an extensive study of the Indiana criminal justice system, made specific recommendations for improvement. She was a member of the Ad-Hoc Committee on Standards and Goals of the Indiana Criminal Justice Standards and Goals Committee, where she drafted standards and goals for courts, prosecutors and defense counsel in areas such as sentencing, court organization and criminal charges. She was a member of the Indiana State Bar Association's Commission on Marion County Courts and Commission on Family Law Courts, which conducted an in-depth study of the Marion County court system and Marion County domestic relations courts, providing recommendation for organization and selection. Judge Shields was also a member of the Judicial Liaison Committee and Judicial Ethics Committee of the Hamilton County Bar Association. She is a member of the Judicial Improvement Committee of the Indiana State Bar Association and Vice-President of the Board of Visitors of the Indiana University School of Law.

Judge Shields has held numerous Committee appointments in the American Bar Association and has served on the Board of Managers of the Indiana Judges Association and the Indiana Judicial Center. She has been President of the Region V Board of the Criminal Justice Planning Agency and was General chair of the 1993 Fall Meeting of the Indiana State Bar Association.

Judge Shields has also been active in her community. She is a Board Member of the Information and Network Services, Inc.; a member of the Phi Delta Phi Legal Fraternity; and a member of the Sheridan, Indiana, First United Methodist Church.

Judge Shields has received many honors since she has been a member of the judiciary, including being the first recipient of the Antoinette Dakin Leach Award of the Indianapolis Bar Association; receiving the Paul Buchanan Award of Excellence from the Indianapolis Bar Association; and being made an Honorary member of Delta Kappa Gamma.

BETTY SCALES BARTEAU

Judge of the Marion Superior Court

Civil Division, Room Three

January 1, 1975 - December 31, 1990

Judge of the Indiana Court of Appeals

January 1, 1991 - To Date

Term Expires: November 2004

D.O.B.: October 19, 1935

Democrat



When Betty Barteau was elected to the Marion Superior Court in 1974, she became the second woman in the history of the State of Indiana and the first woman in Marion County, Indiana, to serve as a trial judge. Effective January 1, 1991, she was appointed by Governor Evan Bayh to the Indiana Court of Appeals, becoming the third woman to serve on that court.

Judge Barteau is an Indiana native, graduating from Boonville High School in Boonville, Indiana. After her graduation from high school in 1952, Judge Barteau became a comptometer operator with Standard Oil Company of Indiana. She worked full time in that position until 1956 and then part-time until 1961. During this time she attended Indiana University Extension and in 1961 was admitted to Indiana University School of Law—Indianapolis without an undergraduate degree. She graduated in 1965 with distinction, and was a member of the *Indiana Law Review* and Order of the Coif. Judge Barteau received her Masters of Laws from the University of Virginia in 1995.

Judge Barteau was married upon graduation from high school at age sixteen to her first husband, an engineer, and they are the parents of three sons and two daughters. In 1968, she was married to her second husband, an attorney, and they were divorced in 1974.

Judge Barteau's first job after graduation from law school was as a deputy prosecutor in Warrick County, Indiana. She later held positions as deputy prosecutor of Spencer County; Warrick County Attorney; Warrick County Park Board Attorney; Tennyson, Indiana Town Attorney; and Boonville City Court Judge. During the years of 1965 through 1969, she also was in private practice in Boonville, Indiana, with her brother, John Burley Scales. In 1969, Judge Barteau moved to Indianapolis where she accepted an appointment to the Indiana Employment Security Review Board. She also established a law practice on the west side of Indianapolis with a former classmate, Charles Runnels. She served on the Review Board until 1972, and then worked in her law firm in a general practice until her election to the Marion Superior Court in 1974.

During her sixteen years of service on the Marion Superior Court, Civil

Division, Room Three, Judge Barteau became a specialist in family law. She taught family law at the National Judicial College in Reno, Nevada, from 1979 to 1994. She was Chair of the Faculty Council at the National Judicial College in 1990, and in 1993 received its highest award, the Erwin N. Griswold Award for Excellence in Teaching. She was the keynote speaker at the New Zealand Family Law Conference in 1991.

During her years on the superior court, Judge Barteau was the supervising judge of the Domestic Relations Counseling Bureau, where she was instrumental in creating innovative programs in mediation and in child custody evaluation. In 1978, she was named Indiana Woman of the Year by the Women in Communications. She was President of the Association of Family and Conciliation Courts in 1980, an interdisciplinary organization of judges, lawyers and social workers involved in the dissolution of marriage. She received their Distinguished Service Award in 1991.

In 1973 and 1974, Judge Barteau was a member of the National Security Forum at the Air War College in Montgomery, Alabama.

Judge Barteau has been very active in legal organizations. She is a member of the Indiana State Bar Association and the Indianapolis Bar Association. She has served on the Board of Managers of the Indianapolis Bar Association and the Indiana Judicial Conference. She is a member of the Indiana Judges Association, American Bar Association, and was a charter member of the National Association of Women Judges, where she has served as a member of the Board of Directors for two different terms. She serves as the National Association of Women Judges Liaison to the U.S. State Department Central and Eastern European Legal Institute. She was also a Board Member of the Women Judges Fund for Justice in 1993 and 1994.

Judge Barteau organized the Adopt-A-School/Judge program for Marion County in 1993. The program matched a Marion County judge with each middle school in Marion County. Thirty-two judges participated, bringing the reality of law and a legal education to children in their formative years. Judge Barteau was given the Indiana Judges Association 1994 award for "Excellence in Public Information and Education" for this activity.

Judge Barteau has been active in her community, having worked in various political caucuses before her election. She was also a Community Board Member of the Registered Nurse Registry of Private Duty Nurses from 1976 to 1984; a past Board Member of the Girls Clubs of America; past Board Member of the Community Service Council; and a past Board Member of the Family Service Agency.

Judge Barteau has twice been one of three candidates recommended by the Indiana Judicial Nominating Commission to the governor for appointment to the Indiana Supreme Court.

LINDA L. CHEZEM

Judge of the Lawrence County Court
January 1, 1976 - September 30, 1982
Judge of the Lawrence Circuit Court
October 1, 1982 - November 22, 1988
Judge of the Indiana Court of Appeals
November 23, 1988 - To Date
Term Expires: November 2002
D.O.B.: September 26, 1946
Republican



When Linda L. Chezem first assumed the bench on January 1, 1976, she was the first woman to serve as judge in Lawrence County and the third woman to sit as a trial judge in the State of Indiana. Judge Chezem is a Brazil High School graduate, and in 1968, after attending the University of Indianapolis, in Indiana, Monterey Peninsula Junior College in California, and the University of Maryland, she obtained her B.S. in English from Indiana State University in Terre Haute, Indiana. Judge Chezem received her J.D. in 1971 from Indiana University School of Law—Bloomington.

Immediately after law school, Judge Chezem worked as a substitute teacher and began a general practice of law in Paoli, Indiana. She and her second husband, an attorney, were married from 1971 to 1991. They are the parents of two children, Andrew and Sally.

In 1976, Judge Chezem began her judicial career with her appointment by Governor Otis R. Bowen to the newly created Lawrence County Court. On October 1, 1982, she was appointed by Governor Robert D. Orr to fill a vacancy on the Lawrence Circuit Court, thus becoming the first woman to serve as circuit court judge in Indiana. In 1988, Judge Chezem was appointed by Governor Orr to the Indiana Court of Appeals.

Judge Chezem has been a leader and an activist during her judicial career. At the county court level, she established the first-of-its-kind computer link between the court, the Indiana State Police, and the Bureau of Motor Vehicles. She also established the first court-based alcohol and drug services program in Indiana to be certified by the Indiana Division of Addiction Services. While serving on the circuit court, Judge Chezem established Indiana's first treatment alternatives to a street crime program, which was directed toward offenders with substance abuse problems. She was twice awarded the Governor's Exemplary Project Award for her work with the Lawrence County Life Skills Program and the Juveniles Casework Program.

Judge Chezem has been recognized locally and nationally for her expertise in substance abuse. She is a past member of the Governor's Task Force to reduce

drunk driving and has worked with various federal and state agencies to develop strategies for community based programs against substance abuse, for treatment options and for drug control. She speaks and writes on diverse subjects throughout the country.

Judge Chezem has received many honors and awards during her career. Among those are the National 4-H Alumni Award in 1994; National Friend of Extension Award by the Epsilon Sigma Phi National Honorary Extension Fraternity in 1993; in 1991, the Hoosier Hero Award from the Honorable Dan Coats, U.S. Senator from Indiana; in 1990, a Community Service Award from the Bedford Area Chamber of Commerce; in 1989 the Distinguished Hoosier Award given by Governor Robert D. Orr; and in 1988, the Robert J. Kinsey Award for Outstanding Judicial Service and Support to the Children and Youth of Indiana; and the Sagamore of the Wabash given by Governor Robert D. Orr. She has also served on the White House Conference for a Drug Free America. She is a Board member of the Fairbanks Hospital and Robert E. Greenleaf Center, served on the Board of Trustees of the Gibault School for Boys, is a founding member of the Lawrence County Leadership Program, and was a member of the U.S. Constitutional Bicentennial Commission.

Judge Chezem drafted the proposal and helped implement the program that resulted in the computerization of the Indiana Court of Appeals. She currently serves on many national projects including reviewing grant applications for the U.S. Department of Justice, Office of the Juvenile Justice and Delinquency Prevention and the U.S. Department of Health and Human Services Center for Substance Abuse Prevention.

Judge Chezem is a National Judicial Fellow for the National Highway Safety Program, and through Indiana University School of Law—Indianapolis, she is developing a judicial training curriculum.

Judge Chezem has served on the Board of Directors of the Judicial Conference of Indiana and the Indiana Council of Juvenile Family Court Judges. She has also served on the Board of Managers of the Indiana Judges Association and is a past Chair of the Judicial Educational Committee of the Judicial Conference of Indiana. She is a member of the Indiana Council of Juvenile and Family Court Judges, Indiana State Bar Association and the American Bar Association.

JUDITH HAYES DWYER

Judge of the Daviess County Court

February 28, 1976 - December 31, 1987

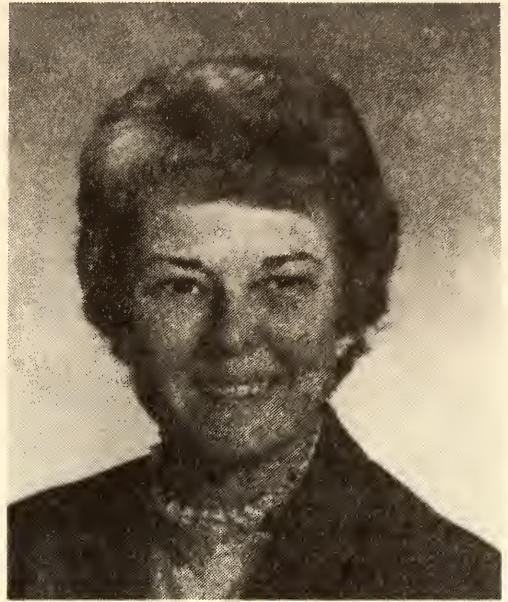
Judge of the Daviess Superior Court

January 1, 1988 - To Date

Term Expires: December 31, 1996

D.O.B.: November 27, 1938

Republican



Judith Hayes Dwyer became the fourth woman to sit as a trial judge in the State of Indiana when she took the bench in the Daviess County Court in February of 1976.

Judge Dwyer is a native Hoosier, graduating from the Washington Catholic High School in Washington, Indiana. She graduated from Marquette University, Milwaukee, Wisconsin, with a B.A. in Liberal Arts after having attended Indiana University for one semester and College of Sacred Heart in Saint Louis, Missouri, for one semester. In 1963, Judge Dwyer graduated from Indiana University School of Law—Bloomington. She was married in 1962 to her present husband, J.D. Dwyer, also an attorney, and they have five children.

Between the years of 1966 to 1976, Judge Dwyer was in the general practice of law with her husband, father, and brother. During this time, she was also a deputy prosecuting attorney for a four-year period. In 1976, she became a referee in the Daviess Circuit Court and two months later, in February, 1976, when the referee's position became a county court, she was appointed judge of that court. There was no competition for the appointment at that time, and she ran for re-election in 1980 and 1984 without opposition. In 1988, the Daviess County Court was changed to the Daviess Superior Court. She successfully ran against a male opponent in 1990 for re-election to the superior court. Judge Dwyer was the first woman to be a judge in Daviess County and one of the early women judges in southern Indiana. Judge Dwyer believes that over the years as more women have taken the bench attitudes toward women judges have changed.

Judge Dwyer has been President of the Daviess County Bar Association and is a member of the American Judges Association and Indiana Judges Association, where she has served as a member of the Indiana Judges Association's Court Benchbook Committee. She is active in numerous community organizations, including being on the Board of Directors of the Daviess County United Way; a member of Kappa Kappa Kappa, St. Simon's Church, St. Simon's Guild, Daviess County Republican Women and Monday Afternoon Club. From 1967 to 1975, she served as a member of the Board of Governors of the Daviess County Hospital.

DARLENE WANDA MEARS

Judge of the Lake Superior Court
Juvenile Division

April 1, 1978 - November 22, 1992

D.O.B.: July 19, 1946

Republican



Darlene Wanda Mears was appointed to the Lake Superior Court, Juvenile Division, on April 1, 1978. She became the first woman to serve as a judge in Lake County and the fifth woman to sit as a trial judge in the State of Indiana.

Judge Mears is a graduate of the Lutheran High School in Los Angeles, California, a 1968 graduate of Valparaiso University with a Bachelor of Arts, and a 1971 graduate of Valparaiso University School of Law. She is divorced with one son.

After graduation from law school, Judge Mears worked for Chicago Title and Trust Company in Chicago, Illinois. She then established a solo legal practice in Lake County, served as a deputy prosecutor, and as a referee in the Lake Superior Court. She was appointed Judge of the Lake Superior Court, Juvenile Division, starting her term on April 1, 1978. She served two full terms and one partial term on this court. She had political opposition in her last retention election and was defeated by 1.6% of the vote.

During her last term in office, Judge Mears was charged with twelve Class D felonies. Seven of those were theft charges, alleging that seven employees were given duties that were for the personal benefit of Judge Mears with the intent to deprive Lake County of the value of their services. Five charges involved ghost employment in which it was alleged that different employees had duties not related to the operation of the court, but to the personal benefit of Judge Mears. After losing the election, Judge Mears went to trial where she was acquitted on each charge.

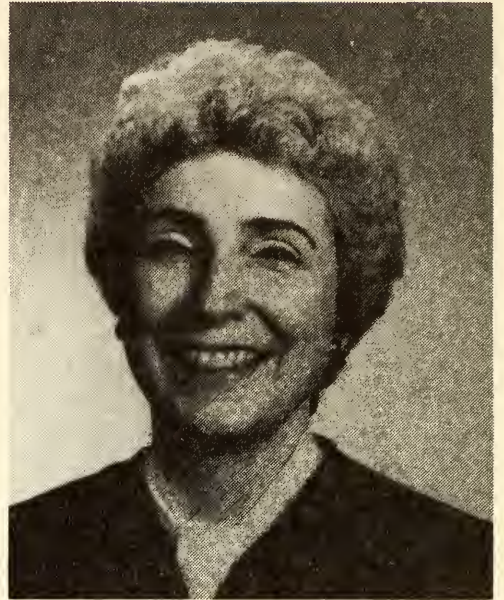
During her nearly fourteen years on the juvenile court, Judge Mears was active in many different organizations concerning juvenile law. Judge Mears served on the Board of Directors and as President of the Indiana Council of Juvenile and Family Court Judges; the Board of Directors of the Judicial Conference of Indiana; the Board of Directors of the National Juvenile Court Foundation; was both on the Board of Directors and President of the Juvenile Justice Task Force; Chair of the Family and Juvenile Law Section of the Indiana State Bar Association; a member of the Judicial Ethics Committee and Probation Committee of the Judicial

Conference of Indiana; was a member of the Criminal Justice Program Advisory Committee; and the Lake County Judicial Advisory Task Force. Judge Mears was also a member of the Lake County Bar Association, Indiana Judges Association, Indiana State Bar Association, American Bar Association, Indiana Council of Juvenile Family Court Judges, and National Council of Juvenile and Family Court Judges. She is also a recipient of the Sagamore of the Wabash Award.

Judge Mears feels that she administered her court in such a way that causes her to be remembered as a judge who loved children and cared for them as if each and every one was her own.

PATRICIA L. GIFFORD

Judge of the Marion Superior Court
Criminal Division, Room Number Four
January 1, 1979 - To Date
Term Expires: December 31, 1995
D.O.B.: April 13, 1938
Republican



Patricia J. Gifford was elected to the Marion Superior Court in 1978 and when she assumed the bench on January 1, 1979, she became the sixth woman to sit as a trial judge in the State of Indiana. Judge Gifford graduated from high school in Athens, Georgia, and in 1960, graduated with an A.B. from the College of William and Mary in Virginia. Prior to entering law school, Judge Gifford taught school in both Washington Township Indianapolis schools and the Army Dependent Schools in Germany. Judge Gifford received her J.D. from Indiana University School of Law—Indianapolis in 1968. She and her husband were married in 1973 and have one child.

After law school graduation, Judge Gifford joined a law firm for six months and then became an Indiana Deputy Attorney General from 1969 to 1970. She was Assistant Attorney General from 1970 to 1972. From 1972 to 1974, she served as a Deputy Prosecutor for Marion County. While serving as Deputy Prosecutor, Judge Gifford became one of the first women in the United States who was assigned to prosecute only sex offense cases. In 1975, she became a referee for the Marion County Juvenile Court.

In 1978, Judge Gifford successfully ran for Marion Superior Court and assumed the bench on January 1, 1979. She ran for re-election in 1984 and in 1990 and was successful both times. During her tenure on the bench, she has presided over a court that handles exclusively felony cases. Judge Gifford achieved national prominence in 1992 by presiding over the Michael Tyson rape trial.

Judge Gifford has been active in her community, her church and the legal profession. She is a former member of the Board of Directors of the Third Christian Church, St. Richards School, the Board of Church Extension of Disciples of Christ, and the Board of Trustees of the Christian Theological Seminary. She has been President of the Board of Directors of the Third Christian Church and has twice served as Chairman of the Board of Directors of the Board of Church Extension of the Disciples of Christ.

Judge Gifford has been a member of the Indiana Lawyers Commission and

currently serves on the Board of Directors of the Legal Aid Society. She is also a member of the Indiana Judges Association, Indiana State Bar Association, Indianapolis Bar Association and the National Association of Women Judges.

ANTOINETTE ANTONELLIS CORDINGLY

Judge of the Marion Municipal Court
Criminal Division, Room Number 10

May 1979 - August 24, 1992

D.O.B.: August 19, 1945

D.O.D.: August 24, 1992

Republican



Antoinette “Toni” Cordingly was the first woman to sit as a judge in a municipal court in Marion County and the seventh woman to sit as a trial judge in the State of Indiana. Judge Cordingly was one of Indiana’s two foreign born women judges. She was born in the village of Sandonato, Italy, and came to the United States in 1956 when she was ten years old. At that point, she had no knowledge of the English language, but she learned the language and later worked to pay her way through school. First, she went to the University of Massachusetts at Amherst, where she graduated in 1968 with a B.A. in Government, and then Suffolk University School of Law in Boston, where she graduated with a law degree in 1971. Judge Cordingly always told the story that after she graduated from the University of Massachusetts, she won a contest for advertising students where one of the prizes was a trip to New York City. Her mother forbade her to go, saying that only single girls who were tramps leave home for a strange city unless it is to enroll in the university. Forbidden to leave home, she resorted to her alternative plan, which mother approved, of enrollment at Suffolk University School of Law in Boston.

While attending a law review course in preparation for the bar examination, she met her husband, an Indianapolis resident, attorney Bruce Cordingly. They were married the following year, and Judge Cordingly moved to Indianapolis. Two children were born during the marriage which ended by divorce in 1988.

After moving to Indianapolis, Judge Cordingly became Coordinator of the Indiana Criminal Justice Planning Agency. From 1973 to 1979, she served as a precinct committeeman and worked on political campaigns for many prominent Republican figures.

In May of 1979, Governor Otis R. Bowen appointed Judge Cordingly to complete the term of Municipal Court Judge Frank P. Huse. She was reappointed in 1981, 1985 and 1989. Judge Cordingly noted that in 1982 she was the only municipal court judge in Marion County, Indiana, history to take a maternity leave for the birth of her first child.

On marking ten years of her service on the municipal bench, Judge Cordingly

said:

Its made me more human, more humble. I've always been a person who expected perfection from myself and sometimes from others. Being here for ten years, I no longer expect perfection. People have good days and bad days. I see everything that comes in here and I say, 'That's life, that's what humanity is all about.'

Judge Cordingly received many awards during her term on the bench. She was named the Indianapolis Woman of the Year by the Indianapolis Star in 1979. She was active with many groups including the Indianapolis Bar Association, the Commission of the Indiana Judicial Standards and Goals Committee, the Civic Theater Masquers Club, the Wayne Township and Eagle Creek GOP Clubs, the Indianapolis Lawyers Commission Volunteer Public Defender Program and the Indianapolis Press Club.

Judge Cordingly had a lengthy battle with breast cancer, which claimed her life on August 24, 1992.

Judge Cordingly was well respected by persons from every social status. As one of her friends said at her death, "If you really do measure life's quality in terms of richness and variety of the friends that you attracted, then she was the woman who walked at a level that few of us will ever be able to attain."

BETTY L. (MCDONEL) SHELTON COLE

Judge of the Delaware County Court

May 27, 1980 - December 31, 1984

Judge of the Delaware Superior Court

Room Number 3

January 1, 1985 - To Date

Term Expires: December 31, 1996

D.O.B.: June 5, 1926

Republican



Betty L. (McDonel) Shelton Cole was appointed on May 27, 1980, to the Delaware County Court to serve the last seven months of the four year term of a deceased incumbent. She became the eighth woman to sit as a trial judge in the State of Indiana. She has since been elected for a four-year term and two six-year terms. In 1984, the county court over which she presided became a superior court.

Judge Cole attended Elwood, Indiana, public schools. She moved to Indianapolis in 1940, and in June 1944 graduated from Emmerich Manual Training High School. Judge Cole worked at the Curtis Wright Division of General Motors as an electrical inspector for six months. She married Elbert Shelton, a lieutenant in the U.S. Air Force, on December 13, 1944. They had two children, one born in 1946 and one in 1952. From 1948 to 1950, she attended classes at Indiana University and from 1963 to 1965, she attended classes at Ball State University. She did not receive an undergraduate degree, but was allowed to enter law school with three years of undergraduate credits. She graduated from Indiana University School of Law—Indianapolis in 1969. Her marriage to her first husband ended in divorce in 1973 and she remarried on December 24, 1975, to Dewey G. Cole. She has three stepchildren from that marriage.

Immediately after graduation from law school, she worked as an associate in a seven member firm in Muncie, Indiana. In November of 1970, she opened her own law office and maintained a general, small town type practice for seven years. She had a male associate who worked for her for two years. She then joined a local firm as a senior partner in 1978.

Judge Cole says that it was not until age fifty-three that she decided that she would like to become a judge. She attributes that decision to experiences beginning in the 1960s when she was President of the local League of Women Voters and was asked if the League would consider studying the Judicial Article of the Indiana Constitution. As a result of those years of studies and contacts with the attorneys and judges, she decided that she wanted to become an attorney and eventually a judge. Judge Cole had a young male judge who was her mentor, asking her many times to serve as judge pro tempore for him. He encouraged her

to run for his office because he was contemplating leaving the bench to complete a doctorate in philosophy. In May 1980, she won the Republican primary nomination to the same court where her Democratic mentor presided. He was killed in an automobile accident two weeks after the primary, and she was appointed by Governor Otis R. Bowen to complete his term. In November of 1980, she was elected to her first complete term on the bench. Judge Cole ran for re-election in 1984 and 1990, and had both male and female competition for those elections.

Judge Cole has been a member of the League of Women Voters and was President of her local league in 1962. She has been a member of the Business and Professional Women. In 1982, she became a charter member of the Riley-Jones Club, a professional women's club. Because the Rotary, Kiwanis and Muncie Club excluded women at that time, a group of professional women created the Riley-Jones Club, purchased an old house and remodeled it as a place for women to have lunch, business meetings, and social gatherings. Men are now allowed to join.

Judge Cole received the Liberty Bell Award from Ball State University in 1986, and a Citation from The Partners for Progress Program of Indiana in 1986. She was awarded the Vivian Conley Public Service Award in 1994, recognizing her as an outstanding woman in government, which was presented by a League of Women Voters representative at the Second Annual Women's Equality Day Celebration.

Judge Cole is a member of the Indiana Judges Association, the Delaware County and Indiana State Bar Associations, and the National Association of Women Judges.

MARYLAND LEWIS AUSTIN

Judge of the Harrison-Crawford County Court

January 1, 1981 - December 31, 1984

D.O.B.: August 25, 1941

Republican



Maryland Lewis Austin was elected to the Harrison-Crawford County Court in the November election in 1980. She was one of four women to assume a bench on January 1, 1981. Judge Austin was the first woman judge in Harrison and Crawford Counties as well as the first woman attorney in those counties.

Judge Austin graduated from Jefferson High School, Lafayette, Indiana, and attended the University of Wisconsin at Madison, Wisconsin, Purdue University in Lafayette, Indiana, and George Washington University in Washington, D.C., before graduating in 1966 from Monterey Institute of International Studies in Monterey, California. There she was awarded a B.S. in political science. She was married from 1961 through 1989 and is the mother of three children.

Judge Austin decided to go to law school because she was interested in people-oriented problem solving. She graduated from Arizona State University with her law degree in 1979. She took the Arizona bar exam after her second year of law school and, after passing the bar, devoted her third year of law school to a civil clinical internship. During that year, she represented an inmate of the Arizona Women's Prison against a deputy attorney general who was seeking to terminate the inmate's parental rights to a young child because of the lengthy prison sentence that she had received.

She was admitted to the Indiana bar in August 1979. From September 1, 1979 until December 31, 1980, she was a part-time Deputy Prosecutor for Harrison-Crawford Counties and had a part-time civil practice in the Whitis Law Office.

Judge Austin decided to run for judge because she did not believe she would be considered for a partnership in the office where she practiced with two male attorneys. She also felt that she could make improvements in the manner in which the local court was being run at that time. She was encouraged in her candidacy by two friends, both judges, one male and one female. She ran against a male incumbent and was elected, beginning her term on January 1, 1981. The court over which she presided handled traffic offenses, small claims, misdemeanors and class D felonies.

In 1984, Judge Austin ran for re-election in Harrison and Crawford Counties

and carried Harrison, but lost Crawford County and the election. In 1990, after the counties became separate judicial districts, she ran in Harrison County only and lost to the incumbent judge. She believes that her experiences while on the bench paved the way for the next woman who held the bench in Crawford County, Judge Elizabeth Ward.

During her term on the bench, Judge Austin implemented the new criminal procedure act in an orderly fashion. She also established the first alcohol and drug treatment program in Harrison and Crawford Counties, established probation services for misdemeanants and substance offenders, and helped to establish the Wyandotte House youth shelter for children in need of services and status offenders.

After leaving the bench, she has developed a solo practice in Corydon, Indiana, and expects one or perhaps two of her daughters to join her in her legal practice.

ELEANOR BANKOFF STEIN

Judge of the Howard County Court

January 1, 1981 - August 31, 1989

D.O.B.: January 24, 1923

Republican



Eleanor Bankoff Stein was one of four Indiana women to take the bench on January 1, 1981. She was elected Judge of the Howard County Court in 1980 and brought the number of women serving as trial judges to twelve. Judge Stein attended Barnard College and graduated in 1944 from Columbia School of Business. She graduated in 1949 from New York University with a law degree. While at New York University she served on the Law Review. Judge Stein says that although the school was co-educational, there were only three women in her class of 300. She was married in 1947 and she and her husband, a physicist, are the parents of two sons and one daughter. Their daughter is an attorney.

For a period of two years before entering law school, she worked as a legal secretary and office manager at the Manhattan Project in New York. After graduation from law school, Judge Stein practiced for one year in New York State, but she and her family moved to Pennsylvania at the end of that year. She stayed home with her family from 1950 to 1976, moving to Indiana in 1963. When her youngest son went to college in 1976, she took and passed the Indiana Bar Exam. She practiced first with Hillis and Button in Kokomo, Indiana, then two years with Paul Hillis, until his death, and two years with Bayliff, Harrigan, Cord & Maughans. During her years as a lawyer, Judge Stein had a general practice, working with divorce, contracts, mortgage abstracts, probate, wills, and real property collections, and worked part-time as a juvenile court referee. In 1980, she won the nomination of the Republican party for judge of the Howard County Court. She successfully ran in the fall election against a male opponent and was re-elected in 1983, running against a female opponent. She retired on August 31, 1989, one and one-fourth years before her term expired, because she had reached the age of sixty-six and her husband was retired.

Judge Stein remains active in many legal and community groups. She has held memberships in the American Judicature Society, Indiana Trial Lawyers Association, *New York University Law Review* Alumni Association, Howard County Legal Aid Society, National Association of Women Judges and the Howard County, Indiana State and American Bar Associations.

Among her many community activities are the Kokomo Human Relations Commission and the Mental Health Association. She has served on the Boards of United Way, St. Joseph Hospital Advisory Board, Youth Services Bureau, Salvation Army, Meals on Wheels, Fellowship Center Halfway House, and Howard County Children's Center. She was the 1992 recipient of the Academy of Women Award for the area of Public Service and Education.

Judge Stein holds memberships in Kokomo in Altrusa, Symposium, Republican Women's Association, Kokomo Country Club, and Temple B'Nai Israel.

Judge Stein feels that her greatest accomplishment during her terms on the bench was the creation of the Howard County Alcohol and Drug Services Program. During her tenure, over 6000 defendants went through the program. Judge Stein feels that it has been her privilege to touch many lives and in many ways help the community where she lives and the persons involved in that community.

SALLY H. GRAY

Judge of the Putnam County Court

January 1, 1981 - To Date

Term Expires: December 31, 1996

D.O.B.: October 6, 1933

Democrat



In January 1981, when Sally H. Gray was elected, she was one of four women assuming the bench, increasing the number of women in the judiciary to twelve. Judge Gray grew up in Kirkwood, Missouri, and graduated with highest honors from both Ohio University where she received a Bachelor of Arts in 1955, and from Syracuse University where she received a Master of Arts in Economics in 1958. Twenty-one years later, in 1979, she received her J.D. from Indiana University School of Law—Indianapolis with high honors.

Between obtaining her masters degree and her J.D., Judge Gray was an economics instructor at DePauw University in Greencastle, Indiana; Wabash College in Crawfordsville, Indiana; Little Rock University in Little Rock, Arkansas; and Ohio University in Athens, Ohio. At age forty-two, after being married for twenty years, having a son and a daughter, and being a career teacher, Judge Gray decided to go to law school believing that she could make a difference in her community by entering the legal profession.

Judge Gray graduated from law school in 1979, and in 1980 was asked to run for the county court bench. She was first elected in 1980, and again in 1986 and 1992. Judge Gray does not intend to seek election to a fourth term. Judge Gray was the first woman to be elected to a trial bench in Putnam County and believes that simply her presence in the court has helped to overcome barriers for women attorneys. In 1993, when Diana LaViolette was elected judge of the Putnam Circuit Court, Putnam County became the first Indiana county with more than one court to have an all female judiciary.

During Judge Gray's tenure on the bench, she has been very active in judicial education and has both taken and taught many courses at the National Judicial College and the Indiana Judicial Center. She has taught courses at the National Judicial College on alcohol, drugs and the courts and has published a number of articles. Among those are a March 1989 *Res Gestae* article entitled, *Counselling the Chemically Dependent and Co-Dependent Client—an Opportunity to Make a Difference*, co-authored with Dr. Tim Kelly, Medical Director of the Fairbanks Hospital. She also had a series of articles published in her local newspaper, the

Banner-Graphic, entitled, "The U.S. Constitution, the Bill of Rights and Our System of Criminal Justice: A Bicentennial Perspective in a Nutshell." Judge Gray has also published a set of manuals to assist persons for their appearances and presentations in small claims courts.

Judge Gray has been a leader in the legal community. She served on the Commission on Women in the Profession for the Indiana State Bar Association in 1989-1990; the Hart Task Force for the Indiana State Bar Association in 1991 and 1992 (a commission to examine the entire structure and programs of the Association); and the Board of Directors of the Indiana Judicial Conference in 1985-1990 and 1993 to date. She has been both member and Chair Person of the County Court Committee of the Indiana Judicial Conference and served as Secretary-Treasurer of the Indiana Judges' Association in 1989-1991, the first time that Association had a woman officeholder.

Of special interest to Judge Gray has been the topic of alcohol and drug abuse and her work in that area has resulted in Judge Gray receiving numerous honors. In 1994, she was appointed by the White House Office of Drug Control Policy to a seven member panel on Reducing Drug Use in Rural America. She was on the Steering Committee of the Governor's Commission for a Drug Free Indiana for four years and received the Rector Health Association Award in 1994 from the Putnam County Family Support Services for work in the community to combat domestic violence. Currently, Judge Gray serves on a State of Indiana Sentencing Evaluation Task Force funded by a Clark Foundation grant.

Over her terms of office, Judge Gray has been involved in the creation of many court related innovations in that field. Among those was the creation of "Phoenix," a Clay-Putnam County Community Correction program to provide an alternative to prison for non-violent offenders; the creation of the P.I.E. Coalition (prevention, intervention and education), a community wide, broadly based effort to reduce the use and abuse of alcohol and other drugs; education classes at the Indiana State Farm with inmates in recovery conducting the anti-drug and alcohol program; and various other drug-alcohol related programs.

In 1994, she was named a Sagamore of the Wabash by Governor Evan Bayh for her work in her community and state to combat substance abuse.

JEANNE JOURDAN

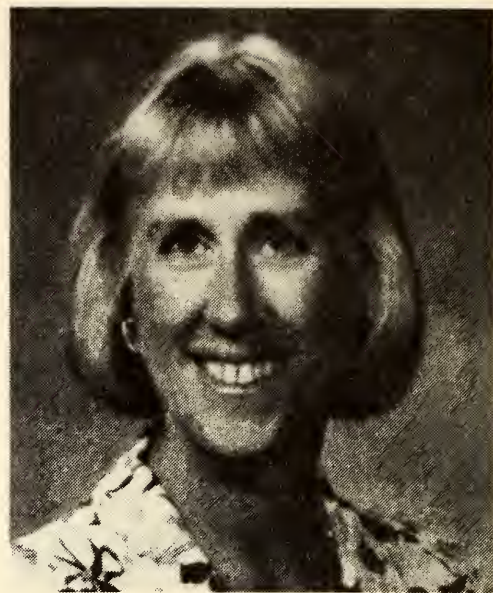
Judge of the St. Joseph Superior Court

January 1, 1981 - To Date

Term Expires: December 31, 1996

D.O.B.: July 14, 1939

Democrat



When Jeanne Jourdan was appointed to the St. Joseph Superior Court on January 1, 1981, she became the first woman trial judge in St. Joseph County, Indiana, and was one of four women to take the bench on that date. Judge Jourdan is a graduate of the Gwynedd-Mercy Academy in Gwynedd Valley, Pennsylvania, and a 1961 graduate with a Bachelor of Arts from Chestnut Hill College. In 1975, she graduated with her J.D. from the University of Notre Dame. Judge Jourdan is married to an economist and is the mother of five daughters.

Between her graduation from college and law school, Judge Jourdan was a homemaker. Immediately after law school, she became an Assistant City Attorney in the South Bend. From 1975 to 1980 Judge Jourdan practiced law on a part-time basis with the law firm of Cekanski & Swartz. Her practice consisted primarily of domestic relations, rights of the handicapped and general law. During this same time, from October 1975 to January 1979, she worked part-time as a public defender, where she defended indigent people accused of both misdemeanors and felonies, both at trial and on appeal. From 1979 to January 1980, Judge Jourdan was a part-time deputy prosecuting attorney. From January 1980 to December 1980 she worked as a full-time deputy prosecutor, prosecuting a variety of felony cases. She was the supervising attorney for the Career Criminal Division, where she administered a grant, directed the staff and selected and investigated cases for prosecution of offenders with at least two prior convictions.

Judge Jourdan was appointed to the St. Joseph Superior Court on January 1, 1981, and has since been retained in three elections. From 1983 to 1986 and from 1990 to 1992, she served as Presiding Judge of the St. Joseph Superior Court. In 1990, Judge Jourdan was one of three nominees to the Indiana Supreme Court.

Prior to taking the bench, Judge Jourdan was a founder of the first Community Residential Correctional Facility in Indiana, the DuComb Center, and served on its Board of Directors for five years. While on the bench, she assisted in the establishment of the Domestic Relations Counseling Bureau, which served the courts in resolving disputes between parents over custody, visitation and child support. In 1983, she started the Court Administered Alcohol Program in St.

Joseph County. This program evaluates persons convicted of drunk driving and places some in community treatment programs and others in educational programs. In 1990, Judge Jourdan chaired the Justice Section of the St. Joseph County Comprehensive Criminal Justice Program for Drug-Free Indiana. She coordinated the efforts of the police, prosecutor, courts and corrections in the county to develop a comprehensive criminal justice plan for drug offenders. This resulted in the establishment of a "Drug Court" and treatment for indigents under court supervision.

Judge Jourdan has been active in teaching during her legal career. She began teaching in 1977 at the Notre Dame Law School; since 1984, she has held the position of Adjunct Professor. In 1987, Judge Jourdan began coaching the Notre Dame Trial Team, which earned three Regional Championships and the National Championship in 1993. She has been a guest faculty member at the Trial Advocacy courses at Harvard Law School, a team leader for the National Institute for Trial Advocacy in Chicago, Indianapolis, Dallas, San Diego and Boulder and on the Faculty of the Indiana University Paralegal Studies Program in South Bend, Indiana. In 1993, Judge Jourdan was honored by the Indiana Judicial College for her contributions to judicial education and her efforts in developing day long interactive evidence workshops for Indiana judges in 1993.

Judge Jourdan is a member of the American Bar Association, Indiana State Bar Association, St. Joseph County Bar Association, American Judicature Society, National Association of Women Judges and the Indiana Judges Association, where she serves on the Board. She has served on the Judicial Administration Committee of the Indiana Judicial College as well as its Board. She was appointed to the Indiana Rules of Civil Procedure Committee in 1993.

Judge Jourdan has been active in her community as well as her profession. She was a Board member of the Holy Cross Parish from 1967 to 1968; the Madison Center (a community mental health facility) in 1982; the St. Joseph YMCA in 1981; the Family & Children Center in 1992; and the S.O.S. (a women's committee on sex offenses). She was also a member of the Civil Liberties Union, the St. Joseph County Shelter, and Leadership I.

In 1994, Judge Jourdan initiated a community wide program to combat gun violence in South Bend, Indiana, "This Is My Neighborhood—No Shooting Allowed," which reached 7000 kids in their classrooms. Local lawyers, police officers and Leadership XX of the Chamber of Commerce, as well as the television media, participated in this effort to empower children to reject violence and develop alternative resolutions to disputes.

CLEMENTINE B. BARTHOLD

Judge of the Clark Superior Court

Room Number 1

January 1, 1983 - December 31, 1994

D.O.B.: January 11, 1921

Democrat



Clementine B. Barthold was one of four women to assume office on January 1, 1983. She was the first woman to serve as judge in Jeffersonville, Clark County, Indiana. Judge Barthold was born in Odessa, Russia, one of the two Indiana foreign born women judges. She came to the United States when she was four years old. She was one of seven children in her family. She grew up and was educated in Aberdeen, South Dakota. In 1941, Judge Barthold married Edward Brendel Barthold, a civil engineer. They traveled throughout the East and South until they settled in Jeffersonville, Indiana, in 1955. Two children, Judith Ann and John Edward, were born to them. Mr. Barthold died in 1972 and in 1981, Judge Barthold married Joel L. Stokes, a retired military man. Their marriage ended in divorce in 1991.

From the years 1960 to 1973, Judge Barthold was the Chief Probation Officer for the Clark Circuit and Superior Courts. From 1973 through 1975, she worked for the PACE (Public Action in Correctional Effort) organization as a research consultant. In 1974, at age fifty-three, Judge Barthold began to fulfill a life-long dream of a college education and enrolled in the General Studies Program at Indiana University Southeast. She transferred to Indiana University-Purdue University at Indianapolis in June of 1975 after accepting a position as Institutional Parole Officer at the Indiana Women's Prison, where she worked until 1980. It was during this period of time that she decided to go to law school. She was admitted to Indiana University School of Law—Indianapolis as a "special student" in the fall of 1976. Judge Barthold pursued her law and bachelor degrees simultaneously. In 1978, she received a Bachelor of General Studies, with Distinction, and in May 1980, graduated from Indiana University School of Law—Indianapolis.

She became a sole practitioner in Jeffersonville, Indiana, and in 1982, decided to run against the incumbent judge of the Clark Superior Court because she felt that he had ended many of the programs that she, as a probation officer, had helped to develop. She was particularly interested in Superior Court, Room Number 1, because it had jurisdiction over juvenile delinquents and she strongly

believed that society must do something to redirect the lives of its young people. She ran for the judicial post so that she would be able to effect such a change in her own community. She won the 1982 election and was re-elected in 1988.

When her second term ended in 1994, Judge Barthold was seventy-three years old. The Indiana Legislature, when creating her court, made seventy a maximum age limit to be elected to the job. Judge Barthold, true to her nature, decided that she would fight the law because she felt that arbitrary age limits were unfair and that she should be judged for her ability and knowledge, not her age. On February 20, 1992, Governor Bayh signed a bill that removed the requirement that a judge under seventy years of age be elected to the Clark Superior Court. Judge Barthold did not seek re-election for her third term.

Judge Barthold has received awards far too numerous to totally recount in this article. Projects that she implemented which demonstrate a positive impact on the criminal and juvenile justice process in Indiana and that have the potential for being replicated successfully elsewhere under similar circumstances have won Judge Barthold five Governor's Exemplary Project awards during her years on the bench. Among those programs honored were the Systematic Training Effective Parenting/Family Focus Project; the Voluntary School Liaison Office Project; the Volunteers in Probation One on One Program; the 24 Hour Juvenile Intake Program; and the Neighborhood Complaint Program. She has twice received the Distinguished Service Award from the Indiana Correctional Association, first in 1967 when she was Chief Probation Officer for the Superior Court and again in 1985 as Judge of the Clark Superior Court.

In 1982, she was one of six women in the United States given the Older Womens League Role Model Award. In 1984, Judge Barthold was presented the Wonder Woman Award by the Wonder Woman Foundation of Warner Communications. This award was given to fourteen women in the United States honored for qualities of courage, risk taking, and pursuing the truth in making a difference in the history of the country. She has also been recognized by the Indiana Youth Institute in 1991 for her devotion to the concept of rehabilitation of juveniles over incarceration whenever possible.

Among the most treasured of her awards was the December 23, 1992, award where she was honored by her peers, the Indiana Judges' Association. She was the recipient of the Association's award for outstanding contributions to the Indiana Judiciary by fostering positive community and media relations. In 1994, she received the "Rosa Parks Award" from the Southern Indiana Chapter of the Southern Christian Leadership Conference in recognition of her contribution to the struggle for freedom, justice and equality and the "Distinguished Alumni Award" from the Indiana University School of Continuing Studies Alumni Association in recognition of her outstanding and significant achievement. The "I am Myne Owene Womman Well at Ese" Award was presented to her by the Women Lawyers of Southern Indiana.

Clementine Barthold, "Tiny" as she is known to her friends, is tiny only in her 4'10" stature. When asked how she hoped to be remembered when she left the bench, she answered, "As having had an impact on the lives of people (particularly the juveniles) who have been going through my Court." All of the numerous awards and honors received by her from different organizations throughout her tenure certainly prove that she achieved that goal.

MARY LEE COMER

Judge of the Hendricks Superior Court

Room Number 1

January 1, 1983 - To Date

Term Expires: December 31, 2000

D.O.B.: December 7, 1948

Republican



Mary Lee Comer was one of four women assuming the bench on January 1, 1983. Judge Comer graduated from Science Hill High School in Johnson City, Tennessee, received an undergraduate degree in education with the honors of high distinction and outstanding student from Indiana University Purdue University in Indianapolis in 1976, and in 1981 graduated *cum laude* from Indiana University School of Law—Indianapolis. She has been married since 1967 to Lee T. Comer, a Danville, Indiana, attorney and businessman. They are the parents of a daughter, Amy, an attorney, and a son, Ben, who is attending law school at the time of this writing.

After graduation from college, Judge Comer taught high school English. With her attorney husband's encouragement, she attended law school and entered the general practice of law in Danville, Indiana, with the firm of Raber & Vandivier. Sometime during this period of time, she served on a jury and decided she could do a better job than what she saw. With the emotional and financial encouragement from her husband, she ran against two male opponents for election for Judge of the Hendricks Superior Court, Room Number 1. She was first elected in 1982 and has subsequently been re-elected without opposition. Judge Comer was the first woman elected to a trial bench in Hendricks County, Indiana. She believes that her presence on the bench has brought about a greater acceptance of women and women's abilities and is slowly helping to overcome barriers for women in the work force.

Judge Comer was President of the Hendricks County Bar Association in 1986-1987 and is a member of the Indiana State Bar Association, the American Judicature Society, and the National Association of Women Judges. Judge Comer has long been involved with the National Institute for Trial Advocacy, donating her time to training lawyers in the skills of advocacy in the courts. In October of 1993, Judge Comer was honored by the Indiana State Bar Association as a "Woman In the Law Honoree" at the annual conference. She is a frequent lecturer for the Indiana Judicial Conference and the Indiana Continuing Legal Education Forum.

During her terms as judge, she has established mediation and counseling programs to help divorcing parties and their children better handle the trauma and emotional harm of divorce. She is also a co-supervisor of the Hendricks Superior Court's Probation Department. This Department has been a leader in the state and the nation in implementing its own home detention program without taxpayer funding. It has also recently established a jail-based drug and alcohol treatment program at the Hendricks County Jail.

Judge Comer is a member of the Danville Friends Church and the Beta Chapter of Tri Kappa and is a Girls Advocate member of Girls, Inc., an organization that promotes the health, education, welfare, and self-esteem of young women.

PATRICIA ANN McNAGNY

Judge of the Whitley County Court

January 1, 1983 - December 31, 1984

Judge of the Whitley Superior Court

January 1, 1985 - December 31, 1991

D.O.B.: June 29, 1926

Republican



Patricia Ann McNagny was one of four women assuming the bench on January 1, 1983, and became the first woman judge in Whitley County, Indiana. Judge McNagny is a Hoosier native, graduated from Columbia City High School and then attended Indiana University, graduating in 1948 with an A.B. degree, receiving the honors of Phi Beta Kappa and President of the Mortar Board. At Indiana University, she was a Wendell Willkie Scholar to the United Nations; President of Kappa Alpha Theta; and Vice President of the Association of Women Students. In 1951, she graduated from Indiana University School of Law—Bloomington, joining a long line of attorneys in her family. The legal profession attracted her father, brother, husband, three daughters, grandfather, uncle and cousins. Her father, Ralph Gates, was Governor of Indiana from 1945 to 1949.

In February of 1951, during her last year in law school, she married Phil M. McNagny, Jr., an attorney. Four daughters were born during the marriage, three of whom are now attorneys. During the years of 1952 to 1968, she was primarily self-employed, doing wills and estate work out of her home office while raising the children. During this period of time, she was also occupied with volunteer work, serving as a Board member and President of the Peabody Library, Vice-Chairman of the Whitley County Republican Committee, Girl Scout Leader and various other community positions. In 1969 and 1970, Judge McNagny worked part-time at the family law firm assisting her father in his estate work. Her husband was an U.S. District Court Judge for the Northern District of Indiana from 1976 until his death in March 1981.

Judge McNagny successfully ran in the Republican primary in 1982 against the incumbent judge and was elected to the Whitley County Court. In 1985, the Whitley County Court became the Whitley Superior Court. In 1986, Judge McNagny ran unopposed for her second term. During the period of time that she decided to run and serve on the bench, she was strongly encouraged by her daughters. In 1991, she left her judicial position to join her daughter, Marcia A. McNagny, in the practice of law.

During her tenure, Judge McNagny was involved in many judicial activities. She introduced community service into criminal sentencing in her county; the use of counseling services for violent offenders and drug and alcohol offenders; the promotion of the GED education to jail inmates; a wider use of work release; literacy training for illiterate offenders; the collection of all fees; the introduction of unsupervised probation; the introduction of a probation users fee for unsupervised probation; and many other innovations to the system. She was instrumental in installing computers in the court, probation and clerk's offices, and introduced a home detention program in certain criminal areas. Judge McNagny saw the need for a Community Corrections Department and worked toward its establishment.

Judge McNagny is a member of the Whitley County and Indiana State Bar Associations and has served as Secretary of the Indiana State Bar Association. In 1994, she was named a Fellow in the Indiana Bar Foundation. Judge McNagny is a life member of the Indiana University Alumni Association and The Nature Conservancy. She has served as Director of the Whitley County Drug Awareness Program and the Otis R. Bowen Center for Human Services. She is a member of the Whitley County Literacy Chapter, Mental Health Association and the Whitley County Old Settlers Day Association. Judge McNagny was given The Nature Conservancy Oak Leaf Award for her successful campaign to purchase a 100 acre Crook Lake property for dedication as Crook Lake Nature Preserve.

KATHY R. SMITH

Judge of the Clinton County Court

January 1, 1983 - June 30, 1990

Judge of the Clinton Superior Court

July 1, 1990 - To Date

Term Expires: December 31, 1996

D.O.B.: January 7, 1952

Republican



Kathy R. Smith was appointed to the Clinton County Court in January 1983, and became one of four women to assume the bench on that date. In 1990, the legislature changed her county court to a superior court. After her original appointed term, Judge Smith successfully ran unopposed in two elections.

Judge Smith is a graduate of Goshen High School, Goshen, Indiana, a 1974 *cum laude* graduate of Ball State University in Muncie, Indiana, and a 1980 graduate of Indiana University School of Law—Indianapolis. After college and during law school, Judge Smith worked in personnel while attending evening classes. Immediately after law school, she began a general practice in a firm with two male attorneys, as well as serving as a deputy prosecutor. During the period of time that she practiced in Clinton County, she was the only woman practitioner in that county. Judge Smith decided early in her life that she wanted to be an attorney, but it was not until her late twenties that she decided that she wanted to be a judge.

Judge Smith has been an officer in the Clinton County Bar Association, is a member of the Indiana Judges Association and the Indiana State Bar Association, and a member of the County Court Benchbook Committee of the Judicial Conference of Indiana. She considers one of her greatest successes the creation of an alcohol-drug program for her court.

Judge Smith has also been active in her community. She has been a member of the Boys and Girls Club of Clinton County; Clinton County Humane Society; Leadership Clinton County; Abilities Services Incorporated; Camp Collum, a youth camp and nature area; and Zonta International.

In order to make the courtroom a learning experience for adults and youth, Judge Smith developed and presented one day programs on "Criminal Justice" for Leadership Clinton County participants. She has also been involved in making films for schools with the emphasis on drunk driving. Judge Smith serves as a Tutor in Frankfort Community Schools and makes regular presentations to church groups, schools and other organizations.

JUDITH S. PROFFITT

Judge of the Hamilton Circuit Court

July 7, 1983 - To Date

Term Expires: December 31, 1996

D.O.B.: January 5, 1942

Republican



On July 7, 1983, Judge Judith Shaw Proffitt was appointed to the Hamilton Circuit Court bench to fill a vacancy created by the resignation of an elected judge. She became the seventeenth woman to sit as a trial judge in the State of Indiana, and the second woman to serve as a trial judge in Hamilton County, Indiana.

Judge Proffitt graduated from Broad Ripple High School in Indianapolis, and in 1967, from Butler University with a Bachelor of Science degree, and in 1971, from Indiana University School of Law—Indianapolis. Judge Proffitt worked as a secretary while attending a college and law school. After law school, she went into partnership with two men attorneys and later joined a larger law firm. During the time she practiced with the larger firm, she was one of two women practitioners in the office. Her husband, an attorney, was also a member of this firm.

When she was in law school, she decided that in the future she would like to become a judge because of a basic interest in legal research and writing. When the circuit court judge in her county retired because of a disability, Judge Proffitt was appointed to fill his term. She has since been elected to two terms of her own. The first woman trial judge in the State of Indiana served in Hamilton County, Indiana, but by the time Judge Proffitt was appointed to the bench, Judge V. Sue Shields had progressed to the Indiana Court of Appeals, leaving Judge Proffitt to be the only woman judge in the five existing courts in Hamilton County, Indiana.

Judge Proffitt has been an active contributor to the legal profession. Prior to going on the bench, she was the co-author of *Indiana Forms of Pleadings and Practice*, 4 volumes, published in 1972 by Matthew-Bender. She was also editor of the Family Law Manual prepared by the Indiana Continuing Legal Education Forum for the 1973 Meeting of the Indiana State Bar Association. Judge Proffitt recently completed a term on the Board of Governors of the Indiana State Bar Association. She was the first Chairperson of the Indiana State Bar Association Commission on Women in the Legal Profession from 1988 through 1991, and has in the past been a member of the Board of Managers of the Indiana Judges Association; Secretary of the Indiana State Bar Association; and General

Chairperson of a Spring Meeting of the Indiana State Bar Association.

Judge Proffitt is also active in her community, serving as Trustee of the Carmel-Clay Public Library, past President of the Carmel-Clay Educational Foundation, past Director of Hamilton County League of Women Voters, and a speaker and contributing author to many seminars for the Indiana Continuing Legal Education Forum.

SARAH EVANS BARKER

Judge of the United States District Court
for the Southern District of Indiana

March 30, 1984 - To Date

D.O.B.: June 10, 1943

Republican



When Sarah Evans Barker was appointed to the U.S. District Court by President Reagan, she became the first woman federal judge in Indiana and the eighteenth woman to sit as a trial judge. Judge Barker graduated from Mishawaka High School in Mishawaka, Indiana, and in 1965 from Indiana University—Bloomington. While working on her undergraduate degree at Indiana University, she was active in the Indiana University Foundation and student government.

After graduating from Indiana University, Judge Barker worked for a year on the residence hall staff at the University of Rhode Island to earn enough money to enroll in law school. In 1969, she received her J.D. from American University Law School in Washington, D.C., where she served on the law review.

While in law school, she worked part-time as a special assistant to the parole executive on the D.C. Parole Board. After graduating from law school, she served first as Legislative Assistant to Congressman Gilbert Gude (R. Md.) and then to Senator Charles H. Percy (R. Ill.). In 1971, she was appointed Special Counsel to a Permanent Sub-Committee on Investigations, Senate Government Operations Committee and in 1972 she became the Director of Research and Director of Scheduling and Advance for Senator Charles H. Percy's re-election campaign.

Judge Barker married her husband, an attorney, on November 25, 1972, and they are the parents of three children. Also in 1972, she took a position as Assistant U.S. Attorney for the Southern District of Indiana, the first woman to so serve in Indiana. In 1976, Judge Barker became the first Assistant U.S. Attorney.

Judge Barker was in private practice with Bose, McKinney & Evans in Indianapolis from 1977 until 1981, when President Reagan appointed her U.S. Attorney for the Southern District of Indiana. At that time, she was one of only two women to hold that job in the United States. In 1984, she was appointed a federal district court judge in the State of Indiana, the first woman to so serve in Indiana. In 1994, she was elevated to Chief Judge of the U.S. District Court for the Southern District of Indiana.

Judge Barker had considerable experience in the courtroom, both as a

government lawyer and a private practitioner, when the vacancy occurred on the U.S. District Court. She believed that her work ethic and temperament would serve her well in the position. There were three finalists recommended to the President by a merit selection committee: Judge Barker; another woman, V. Sue Shields, the first woman trial judge in Indiana, now a U.S. Magistrate; and a man, Randall T. Shepard, presently the Chief Justice of Indiana. Currently, the Federal District Court for the Southern District of Indiana is composed of five active judges and two senior judges. Five judges and one senior judge serve in the Northern District. Judge Barker remains the only female federal district court judge in Indiana.

Judge Barker has received numerous honors and awards during her career. In 1984, she was named Indiana Woman of the Year by the Women in Communications; in 1989, she received both the Touchtone Award given by The Girls Club of Greater Indianapolis, and the Wabash College Peck Award; in 1993, she received the Leach Centennial First Woman Award from the Valparaiso School of Law, and the Antoinette Dakin Leach Award, from the Indianapolis Bar Association. Judge Barker has received four honorary degrees: in 1984, an Honorary Doctor of Laws from the University of Indianapolis; in 1987, an Honorary Doctor of Public Service from Butler University; in 1991, an Honorary Doctor of Laws from Marian College; and in 1993, an Honorary Doctor of Humane Letters from the University of Evansville.

Judge Barker is a member of the Long Range Planning Committee of the Judicial Conference of the United States, a member of the Judicial Council of the Seventh Circuit, and a member of the Judicial Fellows Commission of the U.S. Supreme Court. She also is a member of the Federal Judges Association, the National Association of Former U.S. Attorneys, the Indianapolis Bar Association, Indiana State Bar Association, and the American Bar Association. She is a member of the Board of Advisors of Valparaiso University School of Law, Indiana University School of Law—Bloomington and Indianapolis and a member of the Board of Visitors of Indiana University School of Law—Bloomington.

Judge Barker is also active in civic and religious affiliations. She serves on the Board of Directors of the Methodist Hospital of Indiana and the Conner Prairie Museum. She was the first female member of the Indianapolis Downtown Kiwanis Club. She is a member of the Indiana Historical Society, the Morgantown United Methodist Church, and the Indiana Leadership Celebration.

OLGA HULEWICZ STICKEL

Judge of the Elkhart County Court

June 8, 1984 - To Date

Term Expires: December 31, 1996

D.O.B.: December 28, 1947

Republican



With her 1984 appointment, Olga Hulewicz Stickel became the first woman to sit as a trial judge on a court of record in Elkhart County, Indiana, and the nineteenth woman in the State of Indiana. Judge Stickel graduated from Goshen High School, Goshen, Indiana, and, in 1970, received her Bachelor of Arts from Indiana University and her Master of Library Science in 1972. In 1976, she received her J.D. from Indiana University School of Law—Bloomington. Judge Stickel was married in June of 1971, and she and her husband are the parents of three sons.

Prior to attending law school, Judge Stickel was employed by the Indiana University Library. Immediately after law school, she did volunteer work and awaited the birth of her first son. She then opened a law office as a sole practitioner. She served as a Public Defender by appointment and from 1978 to 1984 was a part-time Goshen City Court Judge. Then in 1984, she decided to become a candidate for the Elkhart County Court. She had announced her intentions when the sitting judge stepped down in 1984. Governor Orr appointed her to finish that term and she was elected in 1984 and again for a second term, defeating male opponents in each election. She presides over a court with jurisdiction over criminal cases up to class D felonies and \$10,000 in civil matters.

Judge Stickel is a member of the Elkhart County Bar Association and is the Past President of the Goshen City Bar Association. She is also a member of the Probation Committee of the Judicial Conference of Indiana and is a 1990 graduate of the Indiana Judicial College.

Most of Judge Stickel's activities outside of the judiciary have been with her children's school, where she has been the President of the Parent Teacher Organization (PTO).

MARY RUDASICS HARPER

Judge of the Porter County Court
Room Number 2

January 1, 1985 - May 31, 1986

Judge of the Porter Superior Court
Room Number 3

June 1, 1986 - To Date

Term Expires: December 31, 1998

D.O.B.: September 18, 1950

Republican



Mary Rudasics Harper was elected to the Porter County Court in 1984. When she assumed office on January 1, 1985, she became the twentieth woman to sit as a trial judge in the State of Indiana. Judge Harper graduated from Saint Mary's Academy, South Bend, Indiana, and from Colorado State University in Fort Collins, Colorado, with a Bachelor of Arts in May 1972. She graduated from Valparaiso University School of Law with a J.D. in December 1974, and began practice in Porter County, Indiana, in 1975. Her first employment was as a deputy prosecuting attorney. She became the Chief Deputy Prosecutor three years later. In 1979, she decided to be a part-time prosecutor so that she could open a solo law practice. She worked in that practice for approximately six years and at the time she left there were four attorneys in the office, two male and two female.

Judge Harper was married in 1981 to her first husband, an attorney, and that marriage ended in divorce. From that marriage, she has one child and four stepchildren. She remarried in 1993 to another attorney.

Judge Harper was about twenty-four years old when she decided that she eventually wanted to be a judge. About ten years later, in 1984, in the primary election she successfully ran against the male incumbent and then won a contested general election against a male opponent. She was strongly encouraged to run for election by her first husband who acted as her mentor. In 1986, the Porter County Court, Room Number 2, to which she was elected, was changed to the Porter Superior Court, County Division. She was re-elected in 1992. Presently, in Porter County, there are six judges, two of them are women.

At this point in her tenure on the bench, Judge Harper has been involved in numerous felony and misdemeanor trials, including over fifty jury trials.

Judge Harper has been involved in many professional activities since joining the legal profession. She was a 1993 member of the Board of Managers of the Indiana Judges Association, a member of the Indiana Judicial Ethics Committee, the State Board of Law Examiners Committee on Character and Fitness and was President of the Porter County Community Corrections Advisory Board. She was the first female deputy prosecutor, first female chief deputy prosecutor, and first

female judge in Porter County. She was also the first and only woman to be elected President of the Porter County Bar Association to date.

Judge Harper is involved in community activities where she is a speaker at various public meetings including a Rape Panel at Valparaiso University, and child abuse panels. She was a Corporate Board member of the Porter County Boys Club, a member of the South Haven Boys and Girls Club Board, and a member of the Indiana Criminal Justice Planning Agency. She was named the Outstanding Porter County Woman by the *Gary Post Tribune* and has received the City of Valparaiso Citation for Community Service.

MARGARET J. HAND

Judge of the Tippecanoe Superior Court
Room Number 3

January 1, 1986 - To Date

Term Expires: December 31, 1998

D.O.B.: July 28, 1951

Republican



Margaret J. Hand assumed the bench on January 1, 1986, becoming the twenty-first woman to sit as a trial judge in the State of Indiana. Judge Hand attended West Lafayette High School and Terre Haute Schulte High School before graduating from Broad Ripple High School in Indianapolis. In 1974, she received her Bachelor of Arts in English Literature from Purdue University, and in 1978 graduated with distinction from the Indiana University School of Law—Indianapolis. Judge Hand and her second husband, an attorney, were married on April 23, 1983, and they have two children.

While in college and shortly thereafter, Judge Hand worked as a legal secretary. While she was in law school, Judge Hand clerked for the only woman then serving on the Indiana Court of Appeals, Judge V. Sue Shields. After graduation, she continued to work as a law clerk for Judge Shields. Following her clerkship, she moved to Lafayette, Indiana, and worked as a trust officer. It was while she was working as a clerk for Judge Shields that she became interested in becoming a judge. In 1982, she was appointed by Governor Orr as a juvenile referee. The Tippecanoe Superior Court, Room Number Three, was created in 1985, and Judge Hand was appointed to become the first judge of that court. She started in that office on January 1, 1986, but had to run for election in November of that year. She had opposition in the primary but no opposition in the general election. She was successful and ran for re-election in November 1992 without opposition. Judge Hand was the first woman to serve on a trial court bench in Tippecanoe County, Indiana.

During Judge Hand's tenure, she has served on the Board of Managers of the Indiana Judges Association, the Board of Directors and Treasurer of the Indiana Council of Juvenile and Family Court Judges, has been a member of the Juvenile Justice Improvement Committee of the Indiana Judicial Conference of Indiana, and a member of the Indiana Judges Association and Indiana State Bar Association.

Judge Hand has been active in Court Appointed Special Advocates (CASA), the Domestic Relations Task Force, and Alternative Community Based Service.

She has also been active in her community, particularly in the schools and Scouts with her children.

She has received numerous awards. Among those are the Girl Scout Woman of Distinction Award, the Tippecanoe County Black Chamber of Commerce Award, Award from United Way, the Indiana Correctional Association Judge of the Year Award in 1981, and the Robert J. Kinsey Award.

ELAINE B. ELLIOTT

Judge of the Dubois Superior Court

January 1, 1987 - To Date

Term Expires: December 31, 1998

D.O.B.: February 8, 1954

Republican



On January 1, 1987, Elaine B. Elliott became the first woman trial judge in Dubois County. She was one of five women in Indiana assuming the bench on that date, increasing the number of women judges to twenty-six. Judge Elliott grew up in southern Indiana and graduated in 1972 from Forest Park High School, Ferdinand, Indiana, as Salutatorian of her graduating class, and from Indiana University in 1976 with a Bachelor's degree with Distinction.

After graduation from college, but before attending law school, Judge Elliott taught school in Jasper, Indiana. She then received her law degree from Indiana University School of Law—Bloomington in January 1982. She worked part-time as a law clerk while she was in law school. After her graduation from law school in 1982, she taught part-time for Vincennes University as an instructor in civil and criminal law while practicing law with the firm of Thom & DeMotte in Jasper, Indiana. In 1986, she successfully ran against the male incumbent judge of the Dubois Superior Court, and then was re-elected without opposition in 1992.

Since being on the bench, Judge Elliott has been very active in both law-related activities and civic groups. She serves on the Board of Governors of the Richard G. Lugar Excellence in Public Service Series and is a 1993 graduate of that course. She also serves as a Team Leader for the 1994-1996 session of the Brooks Inns of Court. Judge Elliott received the Indiana Jaycees Outstanding Young Hoosier Award in 1992; the Jasper Jaycees Distinguished Service Award in 1991; and was Dubois County's Outstanding Republican Woman in 1988.

Judge Elliott served as President of the Dubois County Court Alcohol and Drug Services Program from 1987 through 1992; on the Executive Board of the Dubois County Substance Abuse Task Force from 1991 to 1994; the Dubois County Community Corrections Advisory Board from 1990 to present; the Dubois County 4-H Council Planning Committee from 1993 to present; and the Dubois County Adolescent Services Advisory Board from 1992 to present. She was on the Board of Managers of the Indiana Judges Association from 1990 to 1992 and the Board of Directors of the Indiana Judicial Conference from 1991 to 1993. She was also President of the Dubois County Bar Association in 1985 and has been an

officer numerous other times.

Judge Elliott was appointed by the Indiana Supreme Court to the following committees: Indiana Supreme Court Character and Fitness Committee, 1987 to present; Indiana Supreme Court Records Management Committee, 1987 to present; Judicial Administration Committee of the Indiana Judicial Conference, 1987 to 1992.

Judge Elliott holds or has held memberships in many professional associations and community organizations, including the American, Indiana State, and Dubois County Bar Associations; the American and Indiana Judges Association; the Indiana Council of Juvenile and Family Court Judges; Dubois County Business and Professional Women; Dubois County Panhellenic Association; and is a member of the Precious Blood Catholic Church in Jasper, Indiana.

Judge Elliott has three stepsons, ages three, four and fifteen, from her present marriage to Michael F. Elliott. She is the custodial parent of her children of an earlier marriage, a son born in 1985 and a daughter born in 1987.

SUZANNE TRAUTMAN DUGAN

Judge of the Bartholomew Circuit Court

January 1, 1987 - September 30, 1991

D.O.B.: October 21, 1943

Democrat



On January 1, 1987, Suzanne Forester Trautman Dugan was the first woman to sit as a trial judge in Bartholomew County, Indiana. She was one of five women assuming the bench on that date. Judge Dugan is a native Hoosier, receiving her high school education from Columbus High School, Columbus, Indiana. She graduated from the University of Denver in 1965 with a Bachelor of Arts with honors of Mortar Board. After her graduation from the University of Denver, Judge Dugan was married and had two children, one born in 1970, the other in 1972. That marriage ended in divorce. She remarried in 1991 and has one stepson. She was employed as a social worker and homemaker until 1978, when she entered Indiana University School of Law—Bloomington. At that time, she had never met a woman practicing attorney, but one-third of her 1982 law school graduating class were women.

Immediately after law school, she joined a sole practitioner in a general practice of law. In 1985, at the age of forty-two, she decided that she would like to become a trial judge. Judge Clementine Barthold encouraged her in that endeavor, helping her realize that she was qualified for a judgeship and could win an election. She ran in 1986 against a male incumbent and was elected to the Bartholomew Circuit Court, a position that had not been held by a Democrat since 1954. She does not believe that her tenure on the court made any particular impact on the system, but believes that the mere fact that there is an increase in the number of women judges has made a difference, making the system more acceptable to the hiring of female attorneys and to women running for judicial offices.

As a judge, she was particularly interested in the diversity of cases in different areas of law that she was exposed to and felt that she was best at negotiation and settlement of cases. During the time that she was on the bench, she became a certified mediator. Judge Dugan resigned from the bench on September 30, 1991, and moved out of the state to enter private practice. She is now involved in a specialized area of law where she does both negotiated settlements and trial work.

While on the Bartholomew Circuit Court bench, Judge Dugan was a member

of the Bartholomew Bar Association, the American Bar Association, Indiana State Bar Association, National Council of Juvenile and Family Court Judges, and the Indiana Judges Association. In 1989, she chaired the Community Relations Committee of the Judicial Conference of Indiana.

KELLEY B. HUEBNER

Judge of the Martin Circuit Court

January 1, 1987 - December 31, 1992

D.O.B.: January 14, 1948

Republican



With her 1986 election, Kelley B. Huebner became one of twenty-six women to sit as trial judges in the State of Indiana. Judge Huebner is a graduate of Lincoln High School in Vincennes, Indiana, and a graduate of Vincennes University, receiving a General Academic degree in 1968, and a Land Title Technology and Civil Engineering Technology degree in 1974. In 1970, she obtained her Bachelor of Science in Economics from Indiana State University, Terre Haute, Indiana. She then received her J.D. from Indiana University School of Law—Indianapolis in 1979. Judge Huebner has been married since 1979.

Prior to going to law school, Judge Huebner worked as a guidance counselor at Vincennes University from 1971 to 1972, and as a Staff Abstractor for Virginia M. O'Leary, Attorney, in Oakland City, Indiana, from 1974 to 1976.

In the 1986 election, Judge Huebner defeated the incumbent male judge of the Martin Circuit Court. Prior to taking the bench, she served as deputy prosecuting attorney in Martin County; public defender in Dubois County; and Attorney for the Martin County Department of Public Welfare. She was also involved in the general practice of law. She served one term as Martin Circuit Court Judge and lost her campaign for re-election. Judge Huebner was the first woman to serve as judge in Martin County.

After leaving the bench, Judge Huebner became a sole practitioner and served as City Attorney for the City of Loogootee, Indiana, School Attorney for the Loogootee Community School Corporation, and County Attorney for Martin County, Indiana. She has been in practice with O'Leary & Associates in Oakland City, Indiana, since 1994.

Judge Huebner has been very active in community organizations. She serves on the Boards of Directors of the Four Rivers Rehabilitation Services, the Daviess-Martin Rehabilitation Services, and the Vincennes University Alumni Association. She is also a Vincennes University Foundation Associate. Judge Huebner is the Vincennes District United Methodist Church Lay Leader and serves on the Committee On Superintendency, District Council on Ministries, Loogootee United Methodist Church Administrative Board (elected 1995 Chair of the Board), and

other church organizations.

In the past, Judge Huebner served on the Southwest Regional Advisory Board for the Governor's Commission For Drug-Free Indiana; the Martin County Community Corrections Advisory Board; the Committee For Drug-Free Martin County; and the Loogootee High School Scholarship Steering Committee. She received the Vincennes University Faculty Citation Award in Social Science in 1990 and was an Indiana State Bar Association Woman in the Law Honoree in 1993.

Judge Huebner was a member of the Guardianship and Mental Commitment Committee of the Judicial Conference of Indiana, the Indiana Judges Association, the Indiana and National Conference of Juvenile and Family Court Judge, and is a member of the Martin County, Indiana State, and American Bar Associations.

PHYLLIS SCHRAMM KENWORTHY

Judge of the Monroe Superior Court

Room Number III & V

January 1, 1987 - December 31, 1990

D.O.B.: January 27, 1947

Republican



Phyllis Schramm Kenworthy became one of the twenty-second through the twenty-sixth women to sit as trial judges in the State of Indiana when she assumed the Monroe Superior Court in 1987. Judge Kenworthy attended Southport High School in Indianapolis, and obtained an Associate of Science Degree from Indiana University in 1976. She worked as a dental hygienist until she decided to study law. She graduated from Indiana University School of Law—Bloomington in 1981. In 1981, she entered the private practice of law in Bloomington, Indiana, working in the civil area, mostly real estate and family law.

Judge Kenworthy did not have any interest in becoming a judge until she was thirty-eight years old. In 1987, a new small claims court was created in Monroe County, and a friend suggested that she should apply. She was encouraged in her application by several of the male judges in the county. Since this was a new court, the original judge was appointed by the Governor. The applicants were interviewed by the precinct committeemen who selected Judge Kenworthy and forwarded their recommendation to Governor Robert D. Orr. With Governor Orr's appointment, Judge Kenworthy became the first woman to serve as judge in Monroe County, Indiana. After serving one and a half years in the small claims court, Judge Kenworthy was selected by her fellow judges to assume another court where the caseload was civil, felony criminal, and family law.

Judge Kenworthy ran for election in 1990 and was narrowly defeated by a male candidate. Elements of gender were not specifically addressed during the election campaign, but Judge Kenworthy believed that it was an issue with the public because of comments she received when she was knocking on doors seeking re-election.

During Judge Kenworthy's term on the bench, she had a particular interest in the incorporation of mediation into the court system, especially in regard to family law matters. She relates that there was a great deal of opposition to it from both the attorneys and the judges. The attorneys were concerned that it would affect their practices and the judges were not very interested in changing the way they handled cases. Eventually, Indiana and Monroe County enacted mediation rules

and now mediation is routinely used in family law cases.

Judge Kenworthy became trained as a mediator and since leaving the bench has been involved in mediation training, and has been in the private practice of mediation for both family and civil cases. She is a mediator and Advisory Board member with Resolute Systems Inc. of Milwaukee, Wisconsin, and a mediator with U.S. Arbitration and Mediation of Indiana, Indianapolis. She is also a member of the Academy of Family Mediators. Judge Kenworthy serves as Supervising Attorney for the Community Legal Clinic at Indiana University School of Law—Bloomington.

Judge Kenworthy is a graduate of the National Judicial College and serves two times a year there as a faculty member in a forty hour mediation course for judges. She also serves as a hearing officer for the Indiana Supreme Court Disciplinary Commission.

Judge Kenworthy is also active in her community. She is in the Women Partners Program, Office for Women Affairs at Indiana University, was on the Board of Directors of both the Girls Club of Bloomington and the Northside Exchange Club, and was past President of the Network of Career Women. She also is a member of the Indiana State, American and Monroe County Bar Associations and the American Association of Law Schools. During her term on the bench, she was a member of the Indiana Judges Association and the American Judges Association.

ELIZABETH WARD HAMMOND SWARENS

Judge of the Crawford Circuit Court

January 1, 1987 - December 31, 1992

D.O.B.: January 9, 1948

Democrat



On January 1, 1987, Elizabeth Ward Hammond Swarens was one of five women assuming the bench in the State of Indiana. Judge Ward is a native Hoosier and is one of twelve children. She graduated from Corydon Central High School in 1966, and from Indiana University in 1969 with a B.S. in Education.

Judge Ward was certified to teach English and social studies at the high school level and taught in secondary schools in Utah, Maryland, and Indiana before going to the University of Louisville Law School. Judge Ward became interested in going to law school as a result of living in Washington, D.C. during the Watergate era, when she became fascinated by the legal proceedings. She received her J.D. in May 1981. After receiving her law degree, she worked for two years as deputy prosecuting attorney and for four years as a public defender. During these years, she also worked as a sole legal practitioner in the areas of criminal defense, divorce, bankruptcy, small claims collections and wills and estates.

Judge Ward was first married in 1970 and her son, Matthew, was born in 1975. She was divorced from her second husband during her judgeship and in 1992 remarried.

During her law practice, Judge Ward felt that she was a resolution seeker more than an advocate and knew that she could be fair. Therefore, she sought election to the bench. In 1986, she successfully ran for election against a male opponent. Judge Ward graduated from the Indiana Judicial College in September of 1992.

She left the court when her term expired on December 31, 1992, pursuant to an agreement with the Judicial Qualifications Commission not to run for re-election in 1992. Judge Ward had been charged with three counts of alleged misconduct, two relating to actions concerning a will while she was an attorney and a third alleging she failed to avoid the appearance of impropriety while on the bench. These charges were resolved by the above agreement.

After leaving the bench in 1992, Judge Ward moved to Tampa, Florida, to be with her husband. She became a certified family, circuit, civil, and federal

mediator and in July 1993, passed the Florida bar exam. She has now formed a professional association and opened a law office in Tampa and practices in the areas of domestic relations, probate and estate, contract, civil, criminal, juvenile, and bankruptcy law.

CYNTHIA S. EMKES

Judge of the Johnson Superior Court

Room Number 2

July 28, 1987 - To Date

Term Expires: December 31, 1996

D.O.B.: July 27, 1958

Republican



On July 28, 1987, Cynthia S. Emkes was appointed by Governor Robert D. Orr to the Johnson Superior Court. She became the twenty-seventh woman to sit as a trial judge in the State of Indiana and the first woman to serve in Johnson County. Judge Emkes graduated from Seymour High School in Seymour, Indiana. In 1979, after graduating from Indiana University with her Bachelor of Arts degree, she attended and graduated from the Institute of Paralegal Training in Philadelphia, Pennsylvania, and worked two years as a paralegal at an Indianapolis law firm.

Judge Emkes graduated *cum laude* from Indiana University School of Law—Indianapolis in 1985. After graduating from law school, she practiced in Johnson County, primarily in a general civil practice of law. In April of 1987, she became a Juvenile Referee for the Johnson Circuit Court and in July of 1987 she was appointed to complete a vacancy on the Johnson Superior Court, Room Number 2. At the time Judge Emkes was appointed to the bench, there were four other applicants seeking the same appointment.

In 1990, Judge Emkes ran unopposed for election to her first full term. Judge Emkes believes that one of her strongest assets at the time of her appointment was her gender, because it was time for a woman to be appointed in her county, and she was there and qualified for the position. Since she has been on the bench, Judge Emkes has strived to be involved in all phases of her work and to make her voice heard when it is appropriate. She believes that the fact that there has been an increase in the number of women judges and lawyers brings a much more diverse and positive approach to the practice of law and to the judiciary. Judge Emkes feels the most challenging aspect of her career has been, and probably always will be, the balancing of her career with being a wife, a mother, a teacher, a role model, a politician, and a student. There are so many roles to play and never enough time to do them the way she would like. She intends to make the judiciary her lifetime profession, subject to the will of the electorate, and hopes to be remembered as a good listener, and an open-minded and hard-working judge dedicated to service.

Judge Emkes was married in 1980 and has two children, Joshua and Sarah Emkes. Judge Emkes has been an officer in the Johnson County Bar Association; is a member of the County Court Benchbook Committee of the Judicial Conference of Indiana; a member of the Indianapolis State, and American Bar Associations; the Indiana Judges Association; and the National Conference for Juvenile and Family Court Judges.

Z. MAE JIMISON

Judge of the Marion Superior Court
Criminal Division, Room Number 6
August 5, 1988 - December 31, 1990
D.O.B.: June 29, 1943
Democrat



Z. Mae Jimison was appointed by Governor Evan Bayh to sit on the Marion Superior Court, Criminal Division, Room Number 6, and with that became the twenty-eighth woman and the first African-American woman to serve as a trial judge in the State of Indiana. Judge Jimison, one of eleven children, is a native Hoosier. She graduated from Shortridge High School in Indianapolis, and received a Bachelor of Arts and a Master of Science degree from Indiana State University in 1972. In 1977, she graduated with her J.D. from the Ohio State College of Law. She was married on September 25, 1965, and has two sons, Robert M. Jimison, Jr. (Kwamé Kareem), and Willard E. Jimison (Kojo Kenyatta).

Judge Jimison had not attended college until after the birth of her oldest son, Kwamé. At that time, she decided to pursue a career as an attorney to have an opportunity to give him a better life. She worked as a secretary while obtaining her undergraduate degree. After graduation from law school, Judge Jimison returned to Indianapolis where she entered into a law practice and worked as a public defender. On April 7, 1988, she was appointed by the Indiana Supreme Court as Judge Pro Tempore in Marion Superior Court, Criminal Division, Room Number 6. She was to serve until a vacancy caused by the resignation of an elected judge was filled. On August 5, 1988, she was appointed by Governor Orr to complete the term as the judge of that court. Prior to this time, she served three and one-half years as a public defender in Marion Superior Court, Criminal Division, Room Number 2, and four and one-half years as a commissioner in that court.

Judge Jimison states that she never had a burning desire to be a judge, but had considered it in undergraduate school. She did not consider it as a serious possibility until after her criminal court appointment as commissioner.

At the completion of the term to which Judge Jimison was appointed, she announced her candidacy for re-election. She was not slated by the Democrat party in the primary and chose not to run against the party's wishes. Therefore, she was not a candidate in the primary or the general election for that position.

Subsequently, Judge Jimison ran for election to the Indianapolis City Council, and is now in the middle of a four year term in that position. She presently serves

as Director for the Office of Special Population for the State Department of Health. When asked whether she felt that she experienced economic discrimination because of her gender, she answered "I don't know. I never stopped to consider whether a denial of job opportunity was because of race, gender or both. I just kept right on stepping."

Judge Jimison has been very active in her community. She serves on the Boards of Directors of the Indiana Make-A-Wish Foundation, The Indianapolis Chamber Orchestra, The Gennesaret Free Clinic, and the Riverside Community Corrections Facility. She chairs the Dr. Martin Luther King, Jr. Indiana Holiday Commission and was a 1993 National Recipient of "The Making of the King Holiday" Award.

Judge Jimison and her family are active members of the Kingsley Terrace Church of Christ. She has written many gospel songs and a musical entitled, "Momma, I Got Aids," which was presented at the Indiana Black Expo in 1994.

BARBARA ARNOLD HARCOURT

Judge of the Rush Circuit Court

January 1, 1989 - To Date

Term Expires: December 31, 2000

D.O.B.: December 19, 1950

Democrat



Barbara Arnold Harcourt on January 1, 1989, became the twenty-ninth woman to sit as a trial judge in the State of Indiana and the first woman to be a trial judge in Rush County. Judge Harcourt grew up in Rush County and graduated from Rushville Consolidated High School. She attended Earlham College in Richmond, Indiana, and graduated with a Bachelor of Arts in 1973. Fourteen years later she graduated *magna cum laude* from Indiana University School of Law—Indianapolis. In 1974, Judge Harcourt married her husband, Carl.

After graduation from college, Judge Harcourt became a welfare caseworker in Decatur County, Indiana, working with abused and neglected children. After five years, she was promoted to Director of the Rush County Department of Public Welfare. While attending law school, she clerked for an Indianapolis law firm and for the Henry Circuit Court. Immediately after law school, she was the Probate Commissioner in the Henry Circuit Court. In 1988, at age thirty-seven, after working for years with courts on child welfare issues, she decided that she would like to be a judge. She ran for election against the male incumbent judge of the Rush Circuit Court and was successful.

Judge Harcourt believes that the increasing number of women, both as attorneys and as judges, is changing the system and making it more available for other women. Judge Harcourt relates that in her county courthouse, opposite the bench in her circuit courtroom, there is a beautiful stained glass window portraying Justice as a woman. Several people have commented to her that it is great to finally have a woman on the bench and not just in the window.

Judge Harcourt is on the Faculty of the National Judicial College and is completing her work on a Master's Degree in judicial studies from the University of Nevada, Reno.

Judge Harcourt is active in both her legal and civic communities. She has memberships in the Indiana Judges Association, where she is on the Board of Managers, and the Rush County Bar Association, where she has served as President. She serves on the Juvenile Justice Improvement Committee for the State of Indiana and the Judicial Education Committee of the Indiana Judicial

Conference. She has been elected to the Governing Board of St. Luke's Episcopal Church in Shelbyville, Indiana, for fourteen years and serves as Director and Treasurer of the Rush County Community Foundation. She is a member of the Monday Circle Literacy Society and a life member of the Rush County Historical Society.

Judge Harcourt has received numerous awards. Among them are Rush County High School Junior Distinguished Alumni Award in 1989, Rushville Republican Woman of the Year in 1990, and in 1992, Judge Harcourt was awarded the Robert Kinsey Award for outstanding judicial service to the children of Indiana.

ELIZABETH N. MANN

Judge of the Monroe Circuit Court
Division IV

July 20, 1989 - To Date

Term Expires: December 31, 1998

D.O.B.: September 13, 1947

Democrat



With her appointment, Elizabeth N. Mann became the thirtieth woman to sit as a trial judge in the State of Indiana. Judge Mann graduated from Tudor Hall School in Indianapolis. In 1973, after attending Vassar, Cornell, and the University of Wisconsin, she graduated from Indiana University with a Bachelor of Arts degree. Her moves were a result of following her then husband through his academic journey. In 1976, she graduated *cum laude* from Indiana University School of Law—Bloomington. Judge Mann was married from 1967 to 1972 and from 1979 until 1993. She attended and graduated from law school while she was a single parent with two small children.

After graduation from law school, Judge Mann entered into a law practice with another woman and worked part-time as a public defender. She subsequently became a sole practitioner, county attorney, and then a partner in a small firm where she was the only woman of the seven attorneys. She claims that a combination of factors caused her interest to turn to the judiciary. She had always enjoyed legal research and writing. After practicing law for a number of years, she came to believe that judges were in a unique position to make changes in the system. She was also feeling some frustration with her legal practice, which had evolved over the years to the point where it was limited to family law. At about the same time, one of the local judges was appointed to the Indiana Court of Appeals and the vacancy was to be filled by a gubernatorial appointment. She applied, was successful, and was appointed on July 20, 1989. At the time she took the bench in Monroe County, there was one other woman judge, but she was defeated in the 1990 election. Judge Mann ran unopposed for re-election in 1992.

Judge Mann has been very active in the legal profession. She is a member and was Treasurer of the Monroe County Bar Association. She is a member of the Civil Benchbook Committee of the Judicial Conference of Indiana and serves on its Board of Directors, and is a past member of the Board of Managers of the Indiana Judges Association. Judge Mann is also a member of the American and Indiana State Bar Associations, the Indiana Judges Association and the American Judges Association.

PATRICIA ANN WOODWORTH RILEY

Judge of the Jasper Superior Court

Room Number 2

July 1, 1990 - December 31, 1993

Judge of the Indiana Court of Appeals

January 1, 1994 - To Date

Term Expires: November 1996

D.O.B.: September 26, 1949

Democrat



Patricia Ann Woodworth Riley was appointed by Governor Evan Bayh to the newly created Jasper Superior Court, Room Number 2, on July 1, 1990, to become the thirty-first woman to sit as a trial judge in the State of Indiana. Judge Riley is a Jasper County native, graduating from Rensselaer High School and then attending Indiana University, graduating in 1971 with a Bachelor of Arts in Political Science. She then enrolled in Indiana University School of Law—Indianapolis, graduating in 1974.

After her graduation from law school, Judge Riley became a deputy prosecutor in Marion County, Indiana, primarily prosecuting sex offenses. She was married to attorney Michael Riley in 1979, and they practiced together in a general law practice for ten years in Jasper County, Indiana, prior to her appointment to the bench. Judge Riley is the mother of two sons and the stepmother of three daughters. She has been an Associate Professor at St. Joseph College in Rensselaer, Indiana, teaching government related subjects.

In 1988, she ran for election to the Jasper Circuit Court, but lost to the male incumbent. In 1990, a new superior court was created for Jasper County and Judge Riley was appointed to fill that judgeship by Governor Bayh, the first woman judge in that county. She was elected to that position in 1992 without opposition.

In 1994, Judge Riley was appointed by Governor Bayh to fill a vacancy on the Indiana Court of Appeals. She became the fourth woman to serve on that court.

Judge Riley is a member of the American, Indiana State and Jasper County Bar Associations. She is a member of the Advisory Board of the Task Force on Women in the Law and is Chair of the Joint Committee of the Bench and Bar on Gender Issues in the Profession. Judge Riley is on the Board of Directors of the National Association of Women Judges and the Indiana Judges Association. Judge Riley is also a member of the American Businesswomen's Association and Partners for a Drug Free Jasper County.

CYNTHIA J. AYERS

Judge of the Marion Superior Court

Civil Division, Room Number 4

January 1, 1991 - To Date

Term Expires: December 31, 1995

D.O.B.: October 19, 1947

Republican



Cynthia J. Ayers was elected to the Marion Superior Court, Civil Division, Room Number 4, in November of 1990. She was one of nine women assuming the bench in 1991, raising the number of women judges to thirty-eight. She was the second African-American woman to sit as a trial judge in the State of Indiana. Judge Ayers graduated from Shortridge High School in Indianapolis, and obtained a Bachelor of Arts in 1974 from Indiana University. She received her Masters from the Indiana University School of Public and Environmental Affairs in 1978, and in 1982 received her J.D. from Indiana University School of Law—Indianapolis. Judge Ayers is divorced and the mother of one daughter.

In 1972, prior to attending law school, Judge Ayers became a probation officer for the Marion Superior Court, Criminal Division. In 1975, she became a parole agent for the State of Indiana.

Upon graduation from law school, Judge Ayers became a deputy prosecutor in the Marion County Prosecutor's Office and served in that capacity for two years. She then entered into the private practice of law in a six person firm and served as an attorney for the Office of the Utility Consumer Counselor until 1988. In 1988 through 1991, she worked as the Master Commissioner for Marion Superior Court, Title IV-D, presiding over child support collection cases.

Because of her experiences on the IV-D Court, Judge Ayers decided to run for election to the Marion Superior Court. In this court, she exercises a general civil and domestic jurisdiction. She is one of a thirty-two member court, comprised of fifteen superior courts and seventeen municipal courts.

In addition to serving as a judge of the Marion Superior Court, Judge Ayers works on committees in the Indiana State Bar Association, Indianapolis Bar Association, the Marion County Bar Association and the National Bar Association. She is also a member of the Monument Circle Roundtable Club and the Greater Indianapolis Republican Women's Club. She was named as a Girls' Incorporated Forum Series Honoree in 1992, was honored by the National Association of Social Workers in 1992, and also received the Service Appreciation Award from the International Girl Aid League in 1992.

JANE SPENCER CRANEY

Judge of the Morgan County Court

January 1, 1991 - To Date

Term Expires: December 31, 1996

D.O.B.: April 17, 1954

Republican



Jane Spencer Craney was elected to the bench in 1990. She and the other eight women taking the bench on January 1, 1991, brought the number of women who serve in the judiciary in Indiana to thirty-eight. Judge Craney is a graduate of Manchester High School in North Manchester, Indiana, and in 1976, she received her Bachelor of Arts from the Long College for Women at Hanover College. In 1979, she graduated from Indiana University School of Law—Indianapolis, with her J.D. She was married from 1978 to 1981 to an attorney, and is presently married to an airline pilot.

Judge Craney went directly from college to law school. After law school, she served as a law clerk for the Indiana Court of Appeals. She was then hired as a deputy prosecutor to prosecute sex crimes in Morgan County. In 1982, she became the first female elected prosecutor in the State of Indiana. She developed a reputation as a tough prosecutor and was referred to by the local newspaper as “The Iron Lady.” She was re-elected in 1986 and served in that capacity until 1990 when she was elected to the Morgan County Court. Her opponent was the male incumbent who dropped out of the race before the election. With her election, she became the first woman to serve as a judge in Morgan County.

Judge Craney has been active in her profession since her admission to the bar. She is a member of the Public Relations Committee and Education Committee of the Judicial Conference of Indiana and a member of the Mentor Judge Committee at the Indiana Judicial Center. She also served on the Board of Directors of the Judicial Conference of Indiana in 1993-1994. Judge Craney, as a role model for young women of her community, tries to participate in activities to expose young people to the legal profession, such as Girl Scouts and school trips to the courthouse. She also reads in elementary schools and does a mock trial in middle schools.

SUSAN HAY HEMMINGER

Judge of the LaPorte Superior Court

Room Number 4

January 1, 1991 - September 2, 1993

D.O.B.: October 14, 1958

D.O.D.: September 2, 1993

Republican



When Susan Hay Hemminger assumed the superior court bench in LaPorte County in 1991, she was one of nine women to enter the judiciary, the largest group of new women of any year to date. Judge Hemminger was a 1980 graduate of the University of Michigan with a Bachelors in Art History and a 1983 graduate of the Valparaiso University School of Law.

Shortly after her graduation from law school, she opened a law office in Michigan City, Indiana, and then joined the Hyatt Law Office for a short period of time in Merrillville, Indiana. In 1984, she entered into a law practice with Gregory H. Hofer in LaPorte, Indiana. While there she worked in a general practice of law, including probate, criminal work, and juvenile work, and was a public defender in the LaPorte County Court system.

Her law partner encouraged her to run for judge. In June of 1990, she was nominated and selected by the Republican party caucus as the Republican candidate for the LaPorte Superior Court. Prior to that time, she had not been active in politics.

The year 1990 was a challenging one for Judge Hemminger. One month after her selection as the candidate for the Superior Court judgeship, her husband committed suicide. Then in October, during her campaign for the LaPorte Superior Court, she announced that she had been diagnosed with cervical cancer. She nonetheless continued her campaign and defeated Democrat Barbara Friedman in the November election.

Judge Hemminger served until March of 1992, when her cancer recurred. She died on September 2, 1993, at the age of thirty-four.

Judge Hemminger chose a phrase from John Wesley's Rule to be read at her funeral. During her judicial tenure, she had kept it pinned to her bulletin board where she could see it each day. It read: "Do all the good you can, by all the means you can, in all the ways you can, in all the places you can, at all the times you can, to all the people you can, as long as ever you can."

In her will, she established the Susan Hay Hemminger Scholarship Foundation to award tuition scholarships for county residents pursuing post-high school

education. She also selected a grave site memorial that represented her life and service to the county. She chose a bench that bears the following biblical inscription: "What does the Lord require of you but to do justice, love kindness and walk humbly with your God."—*Micah* 6:8.

PAULA E. LOPOSSA

Judge of the Marion Superior Court
Criminal Division, Room Number 1

January 1, 1991 - To Date

Term Expires: December 31, 1996

D.O.B.: February 21, 1944

Democrat



Paula E. Lopossa was elected in 1990 and was one of nine women assuming the bench in 1991. Judge Lopossa graduated from high school in Berkley, Illinois, and received a Bachelor of Arts in English in 1966 from Millikin University in Decatur, Illinois. She taught school in Decatur, Illinois, for one year before attending graduate school at Indiana University—Bloomington. In 1969, she received her Master of English from Indiana University. She then came to Indianapolis, taught high school English during the day and attended night law school at Indiana University School of Law—Indianapolis, graduating in 1973.

After graduation from law school, Judge Lopossa taught one more year and began a private practice in Marion County, Indiana. In 1975, she became a deputy prosecutor in Marion County, trying major felony cases, including murder, rape, and armed robbery. In the two-year period that she was with the Marion County Prosecutor's Office, she was involved in approximately sixty jury trials and obtained convictions in 98% of those cases. During this time, she was selected for the Career Criminal Program, a federally funded program to target offenders with two prior felony convictions.

From 1977 to 1989, she was an Assistant U.S. Attorney for the Southern District of Indiana, assigned to the criminal division. For most of the time, she was responsible for supervising investigations and prosecuting violations of federal criminal laws, primarily in the economic crime area. During her last two years, she was coordinator of the Joint Federal and State Task Force on Obscenity and Child Pornography. During her eleven years as Assistant U.S. Attorney, she tried over twenty-five jury trials in the U.S. District Court and briefed and argued ten cases in the U.S. Court of Appeals.

After about fifteen years as a litigator, Judge Lopossa decided that she would like to change her area of work and that she would like to be a judge. She left the U.S. Attorney's Office to become the Executive Secretary/Hearing Judge of the Indiana Alcoholic Beverage Commission, a job she held until December 1990. It was during this period of time that she ran for election to the Marion Superior Court. She ran in a system unique to Marion County, wherein each political party

selected eight candidates in a primary, and fifteen of sixteen candidates were elected in the general election. Since January 1991, Judge Lopossa has presided over many felony trials because her court is one of the high volume courts in Indiana.

Judge Lopossa believes that the fact that she was a woman was a positive rather than a negative attribute in her election campaign. During Judge Lopossa's term on the Marion Superior Court, she has been involved in the creation of a Public Defender Agency for Marion County and the implementation of a blind filing system for the criminal division in Marion County. Judge Lopossa hopes that during the rest of her career she will be able to work toward eliminating any flaws in the criminal justice system of Marion County.

Judge Lopossa is a member of the Criminal Instructions Committee at the Judicial Conference in Indiana. She has been a volunteer in the Big Sisters Program in Indiana.

MARY LOUISE MCQUEEN

Judge of the Shelby Superior Court

Room Number 2

January 1, 1991 - To Date

Term Expires: December 31, 1996

D.O.B.: April 13, 1952

Democrat



Mary Louise Neijstrom McQueen was elected to the Shelby Superior Court, Room Number 2, in 1990 and became the first woman judge in Shelby County, Indiana. Judge McQueen graduated from Cedar Cliff High School in Camp Hill, Pennsylvania. In 1974, she graduated Phi Beta Kappa with a Bachelor of Arts from Indiana University. She entered Indiana University School of Law—Indianapolis, and graduated in 1979. Judge McQueen married in May 1975 and divorced in 1993. She and her husband, an attorney, have four children.

Judge McQueen started work as a deputy prosecutor approximately one year after graduating from law school. She worked part-time for a small law firm, and part-time in the prosecutor's office. She was in a firm with three male attorneys, practicing primarily tax law, child support and domestic relations.

While she was in law school, she became interested in becoming a judge. In 1980, she ran unopposed in the primary for the superior court judgeship and against the incumbent male in the November election and was unsuccessful. In 1984, she again ran unopposed in the primary, but was opposed by the incumbent male in the general election and was again unsuccessful. In 1990, she ran against a male opponent in the primary election and won, and then in the general election ran against a woman and defeated her by approximately 300 votes.

Judge McQueen is a member of the Special Jurisdiction Committee of the Judicial Conference of Indiana, the Shelby County Bar Association, and the Indiana State Bar Association.

RUTH DIANE REICHARD

Judge of the Marion Municipal Court
Criminal Division, Room Number 16

January 1, 1991 - To Date

Term Expires: December 31, 1998

D.O.B.: September 25, 1960

Republican



Ruth Diane Reichard was appointed to the Marion Municipal Court, Criminal Division, Room Number 16, in January of 1991. She was one of nine women to assume the bench in 1991. Judge Reichard is a 1978 graduate of North Central High School in Indianapolis; a 1982 graduate *cum laude* of Ball State University in Muncie, Indiana, with a Bachelor of Science, English, and History degree; and a 1985 graduate of Indiana University School of Law—Indianapolis. While at Ball State University, Judge Reichard received numerous honors: Alpha Lambda Delta (National Freshman Honor Society) 1979, Honor College Graduate 1982, Mortar Board (National Senior Honor Society) 1982, Lambda Iota Tau (National Literature Honor Society) 1982, and Phi Society (Liberal Arts Honor Society) 1982.

Judge Reichard indicated that she does not know of any specific time when she decided to become a judge, but that it always seemed a possible career path for her from the time she entered the legal profession. Prior to going on the bench, Judge Reichard was a deputy prosecuting attorney in Marion County, Indiana. During her service as a prosecuting attorney, she set up a specialized prosecution unit for family violence at the prosecutor's office and the Adult Protection Services Unit. She is recognized as an expert on domestic violence and has given numerous presentations on many different phases of domestic violence throughout the State of Indiana. She is a member of the Mayor's Commission on Family Violence and an adhoc reviewer of the *Journal of Child Sexual Abuse*. In 1992, 1993, and 1994, Judge Reichard published articles in the *Journal of Child Sexual Abuse*.

Prior to going on the bench, Judge Reichard was an Associate Faculty member at Indiana University—Purdue University at Indianapolis, from 1986 through 1990. She is now a member of the National Council of Family Court Judges, the Indiana State, Marion County, and Indianapolis Bar Associations, the National Association of Women Judges, the Indiana Judges Association, and the American Judicature Society.

Judge Reichard is also active in her community. She is on the Board of

Directors of the Christian Theological Seminary Pastoral Counseling Center and the Indiana Cares Food from the Heart Program, and served on the Board of Directors of Parkview Manor Nursing Home in 1991, the Indiana Coalition Against Domestic Violence from 1985-1986 and 1989-1990, and various other community organizations.

JUDITH A. STEWART

Judge of the Brown Circuit Court

January 1, 1991 - October 21, 1993

D.O.B.: September 22, 1957

Democrat



Judith A. Stewart was elected to the Brown Circuit Court in the 1990 election, becoming the first woman to serve on the bench in Brown County, Indiana. Judge Stewart is a Marion County, Indiana, native, graduating from Speedway High School in Speedway, Indiana. In May of 1979, she graduated *magna cum laude* with a Bachelor of Arts in English and German from Butler University. While there, she had a full tuition academic scholarship each year and was on the Dean's Lists. In 1982, Judge Stewart graduated *cum laude* from Indiana University School of Law—Indianapolis. While in law school, she was the Executive Editor of Volume 15 of the *Indiana Law Review*, was active in moot court, was on the Student Bar Association Board of Directors, was an officer of the legal fraternity of Phi Delta Phi and served on the Faculty Selection Committee. As a student, she published a Note in the *Indiana Law Review* entitled *Beyond Enterprise Liability in DES Cases*.

For one year after her graduation from law school, Judge Stewart clerked for the Honorable Harold Baker, Judge of the U.S. District Court in the Central District of Illinois. When she left the clerkship, she entered the private practice of law with the law firm of Lewis, Bowman, St. Clair & Wagner in Indianapolis, where she worked in a general litigation practice. She worked in the area of criminal defense, personal injury, products liability, civil rights liability and appellate practice. She also prepared and presented seminars for corporate clients on comparative fault and slip and fall cases.

In 1988, she married and began work as a referee of the Brown Circuit Court. Her responsibilities included hearing cases in the areas of class D felonies and misdemeanors, child support issues, small claims, and making recommended findings to the Circuit Court judge. While there, she implemented the Guardian Ad Litem/Court Appointed Special Advocate Program in Brown County. She successfully ran for election to the Brown Circuit Court in 1990. Judge Stewart resigned from her judicial position in October 1993 to become the U.S. Attorney for the Southern District of Indiana.

Judge Stewart is a member of the American, Indiana State, and Brown County

Bar Associations, the Indiana and National Councils for Juvenile and Family Court Judges and has been Chair of the Joint Committee of the Bench and Bar on Gender Issues in the Profession. She was active in Brown County, being on the Brown County Kiwanis Board of Directors, Brown County Community Corrections Board of Advisors, Brown County Business and Professional Women President in 1981, and the Brown County Historical Society.

Judge Stewart believes that having the opportunity to eliminate some institutional prejudices and assisting in educating others in the criminal justice system on issues of domestic violence and sexual crimes were perhaps her greatest impacts as a woman judge.

LISA M. TRAYLOR-WOLFF

Judge of the Fulton-Pulaski County Court

August 1, 1991 - July 1993

Judge of the Pulaski Superior Court

July 1993 - To Date

Term Expires: December 31, 2000

D.O.B.: April 22, 1960

Democrat



Lisa M. Traylor-Wolff, with her appointment in August of 1991, became the thirty-ninth woman to sit as a trial judge in the State of Indiana. Judge Traylor-Wolff graduated from Fort Wayne North Side High School, Fort Wayne, Indiana, and, in 1982, graduated from Ball State University. In 1986, she graduated from Valparaiso University School of Law. She married her husband, an engineer, in 1984, and they have two sons.

After graduating from law school, Judge Traylor-Wolff started a private practice from her home. In 1987, she became the chief deputy prosecutor of Pulaski County as well as an associate attorney in the Murphy Law Office in Winamac, Indiana. She became interested in becoming a judge because of Sandra Day O'Connor's appointment to the U.S. Supreme Court. She was the first woman to practice law in Pulaski County and, upon her appointment by Governor Evan Bayh, was the first woman to serve on the Pulaski-Fulton County Court. She successfully ran for election to that court in 1992 with male opposition. In July 1993, the Pulaski and Fulton County Courts were separated, and the Pulaski Superior Court was created. She was appointed to that court in 1993, and in 1994 successfully ran for re-election against a female opponent.

Judge Traylor-Wolff is a member of the Pulaski County, Fulton County, Indiana State, and American Bar Associations, Phi Delta Phi, the Indiana Judges Association, and the Kiwanis Club of Winamac. In 1992, she was appointed a delegate to the American Bar Association Special Courts division.

NANCY ESHCOFF BOYER

Judge of the Allen Superior Court

August 2, 1991 - To Date

Term Expires: December 31, 1998

D.O.B.: May 1, 1951

Democrat



In August of 1991, Nancy Eshcoff Boyer was appointed to the Allen Superior Court, Civil Division. She became the first woman to serve as judge in Allen County and the fortieth woman to serve in the State of Indiana. Judge Boyer is a native Hoosier. She is a graduate of South Side High School in Fort Wayne, Indiana. In 1973, she graduated *cum laude* from DePauw University with a degree in English Literature. In 1976, she graduated *cum laude* from Indiana University School of Law—Indianapolis.

When she returned to Fort Wayne, Indiana, in 1976, there were only two women in the private practice of law in the Fort Wayne area. She was associated with the Lebamoff Law Offices from 1976 until 1985, where she practiced primarily in the area of family law. In 1985, she joined the law firm of Burt, Blee, Dixon & Sutton. In 1987, she was named a partner and remained there until March of 1990, when she was appointed referee of the small claims division of the Allen Superior Court.

Judge Boyer was appointed to the Allen Superior Court, Civil Division, in August of 1991, by Governor Evan Bayh. To obtain the appointment, she first went through interviews with a nominating commission who selected three candidates to present to the Governor for consideration. Judge Boyer and two male candidates were presented, and the Governor selected Judge Boyer. She has since run for re-election and is now serving her second term.

Judge Boyer is married to an attorney, Thomas P. Boyer, and they have two children.

Judge Boyer is a member of the Indiana State Bar Association, the Allen County Bar Association, and has served on the Board of Directors of the Legal Services of Maumee Valley, Inc., and the Indiana Continuing Education Commission since March 1991.

RONDA R. BROWN

Judge of the Parke Circuit Court

January 1, 1993 - To Date

Term Expires: December 31, 1998

D.O.B.: October 20, 1963

Republican



On January 1, 1993, Ronda R. Brown became the first woman judge in Parke County and one of four women joining the courts in Indiana on that date, increasing the number of women judges to forty-four. Judge Brown is a graduate of Rockville Junior and Senior High schools. In 1986, she received a B.S. in Business Management and a minor in Marketing from Indiana State University. She maintained an academic scholarship for her entire course of study. In 1989, she received a law degree from Valparaiso University School of Law. There she was a member of the Women Law Students Association and the Environmental Law Caucus. Judge Brown has been married since 1983.

After graduation from law school, she joined the law firm of Kenley & Kenley, where she was involved in a civil practice. She held numerous legal positions in Parke County. Among those were Parke County Attorney, Town of Rockville Attorney, Public Defender, Town of Montezuma Attorney, Parke County Planning and Zoning Attorney, and Deputy Prosecutor. Judge Brown had decided at age fifteen or sixteen that she wanted to be a judge when she grew up, so in 1992, feeling that she had experience in several areas of the legal profession, decided that it was time for a new challenge. She ran for election for Parke Circuit Court Judge. She was opposed by a male in the election, was successful, and started her tenure on January 1, 1993.

She believes that her election and the election of other women to the bench have helped open the door for women in all fields of endeavor.

Judge Brown is a member of the Indiana Council of Juvenile and Family Court Judges Association.

DIANA LAVIOLETTE

Judge of the Putnam Circuit Court

January 1, 1993 - To Date

Term Expires: December 31, 1998

D.O.B.: August 29, 1945

Republican



When Diana LaViolette was elected in 1992, she became one of forty-four women to sit as a trial judge in the State of Indiana and the second woman to serve on the bench in Putnam County, Indiana. Her election made Putnam County the only Indiana county where there is more than one court to have an all female judiciary.

Judge LaViolette was born in Sullivan, Indiana, attended North Salem High School, and graduated in 1967 from Texas Christian University with a B.A. in English and History. In 1980, she graduated from Indiana University School of Law—Indianapolis. Prior to going to law school, Judge LaViolette taught high school in Kansas City, Kansas, for two years before joining the Peace Corps, where she served in Turkey. After her two year term in the Peace Corps, she taught for two years in Putnam County and then took a job teaching at the Indiana Women's Prison. The experience of working with women offenders ultimately led her to law school.

Judge LaViolette entered law school in 1975 and married John LaViolette the same year. During her law school years, she gave birth to two children, Alan Paul and Jean Marie. Six months after leaving law school, she took a job with the Putnam County Prosecutor where she was Chief Deputy Prosecutor. She also had a civil practice with a law firm in Greencastle, Indiana. Judge LaViolette, over her years of practice, grew to believe that she was a better resolver of conflicts than a litigator and, thus, decided to run for judge in 1992. She was victorious in a primary where she had three male opponents, with one of the males being the incumbent. Then in the fall election, she ran against a male opponent. Judge LaViolette believes that each year the acceptance of women as professionals gets better and that women get respect when they earn it; however, it takes more for women to win that respect than it does a male member of society.

During the years that Judge LaViolette practiced law, she was the Attorney for the Greencastle Zoning Board and Planning Commission; Attorney for Greencastle Board of Realtors; and a Special Prosecutor in Hendricks, Clay, Parke, and Owen Counties, investigating and prosecuting political corruption and official

misconduct. She taught constitutional law and history at DePauw University.

Judge LaViolette has been active in both her social and legal community. She has been Vice-President of the Putnam County Bar Association, is a member of the Indiana State Bar Association, is past President of the Board of Putnam County Family Support Services, and Board Member of the Mental Health Association, United Way, and the P.I.E. Commission. She is also an Elder in the First Christian Church in Greencastle, Indiana.

SUSAN MACEY-THOMPSON

Judge of the Marion Municipal Court

January 1, 1993 - To Date

Term Expires: December 31, 1996

D.O.B.: December 13, 1955

Republican



Susan Macey-Thompson was appointed to the Marion Municipal Court on January 1, 1993, thereby becoming one of forty-four women to serve as a trial judge in the State of Indiana. Judge Macey-Thompson graduated from Holy Name High School in Reading, Pennsylvania. In 1977, she graduated from Indiana University, Phi Beta Kappa, with an A.B. in Psychology. She is a 1980 graduate from Indiana University School of Law—Bloomington. Judge Macey-Thompson and her husband, an attorney, have one daughter.

Immediately after her graduation from law school, Judge Macey-Thompson worked in the Human Resources Department for Continental Forest Industries in Greenwich, Connecticut. She was admitted to the Pennsylvania bar in 1980 and in that year returned to Indianapolis and took a job as a paralegal in the prosecutor's office in the child support division. She was admitted to the Indiana bar in 1981 and accepted employment in the City Legal Division as Assistant Corporation Counsel. Subsequently, Judge Macey-Thompson worked as an Assistant to the Personnel Director and was in the private practice of law. She worked in the Office of the Majority Attorney in the Senate during legislative sessions in the years 1986, 1988 through 1990, and in 1992. From 1986 through 1989, she was a Marion Municipal Court Commissioner in the criminal division. In 1990, she accepted a position as assistant to the CEO of USA Funds, Inc., and worked there for a year and one-half.

In 1992, through her work experience serving as a municipal court commissioner, Judge Macey-Thompson applied for a municipal court appointment. She was interviewed by the Marion County Municipal Court Nominating Commission and her name, along with that of a male and a female, was sent to the Governor. Governor Evan Bayh appointed her effective January 1, 1993.

Judge Macey-Thompson is a member of the Indianapolis Bar Association and is on the Board of Managers of the Indiana Judges Association. She is also a Fellow of the Indianapolis Bar Association. She is on the Board of Trustees of the Bethel United Methodist Church and is a volunteer at St. Richard's School in Indianapolis.

NANCY HARRIS VAIDIK

Judge of the Porter Superior Court

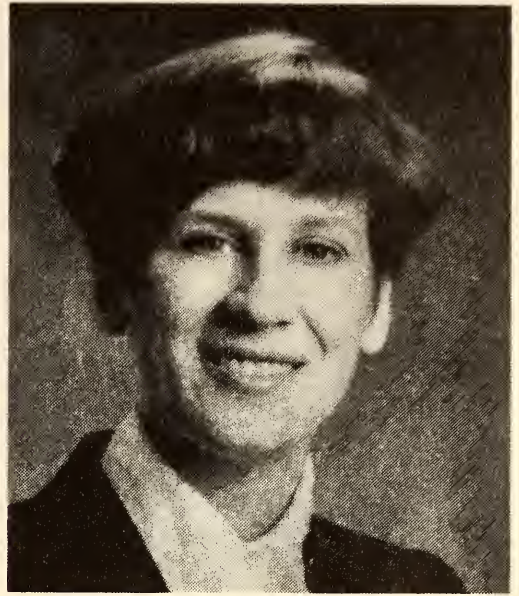
Room Number 4

January 1, 1993 - To Date

Term Expires: December 31, 1998

D.O.B.: June 24, 1955

Democrat



Nancy Harris Vaidik was elected in November 1992 to the Porter Superior Court to become one of forty-four women to serve as a trial judge in the State of Indiana. Judge Vaidik is a graduate of Portage High School, Portage, Indiana. She graduated from Valparaiso University in 1977 with high distinction and a Political Science and Psychology double major. She graduated from Valparaiso University School of Law in 1980. She was married to her first husband from 1977 to 1980 and she and her present husband, an attorney, were married in 1982. Judge Vaidik has twin daughters and two stepchildren.

Judge Vaidik worked as a full-time deputy prosecutor from 1983 until 1986. She then became a part-time deputy prosecutor working in the sexual assault and child abuse area until 1992. Judge Vaidik was also a partner in a law firm with her husband and one other attorney from 1986 through 1992. In 1986, she began teaching Trial Advocacy as an Adjunct Professor of Law at Valparaiso University.

After practicing law for a number of years, primarily as a trial attorney, she decided that she would like to be judge and thought that more women needed to be represented on the bench. She ran successfully for election against the male incumbent in the November 1992 election. Porter County has six judges and the two female judges both preside in the County Court division.

Prior to assuming the bench, Judge Vaidik was very active in trial work. She tried nearly 100 jury trials and hundreds of bench trials. These included many high-profile cases, including murders, rapes, drug cases, robbery, arson, and habitual offenders. As a prosecutor, she developed an interest in community corrections and served as one of the first members of the local Community Correction Advisory Board and continues to work in those programs today. As a prosecutor, Judge Vaidik started the Porter County Victims Assistance Program and the Porter County Sexual Assault Program. Because of her special interest in victim issues, she is often asked to speak to various organizations.

Judge Vaidik served from 1981 to 1986 on the Porter County Welfare Administration Review Panel. She has also been named to the Who's Who in

American Law and, in 1990, was named the local United Way Volunteer of the Year for her work with a local battered women's shelter. Judge Vaidik is a member of the Porter County, Indiana State and American Bar Associations.

SHEILA MARIE MOSS

Judge of the Lake Superior Court
County Division, Room Number 2
February 1, 1993 - To Date
Term Expires: December 31, 1996
D.O.B.: July 18, 1956
Democrat



On February 1, 1993, Sheila Marie Moss was appointed to the Lake Superior Court, County Division, Room Number 2, and became the forty-fifth woman to sit as a trial judge in the State of Indiana and the third African-American woman to serve at this level of the judiciary.

Judge Moss graduated from Bishop Noll Institute in Hammond, Indiana, and obtained her B.A. from Valparaiso University in 1978. From June 1979 through May 1980, Judge Moss was the Writer/Analyst for the Gary Neighborhood Services Multi-Handicapped Program, where she wrote proposals for funding and analyzed current legislation concerning handicapped persons. From May 1980 through January 1981, she was the Department Head of the Youth Leadership Program for the Gary Neighborhood Services. Her responsibilities included planning and implementing cultural and educational activities for Gary, Indiana's disadvantaged youth. She was a Labor Relations Intern at Bethlehem Steel Corporation from January 1980 through June 1981.

In 1981, Judge Moss graduated from the Valparaiso University School of Law. In law school, she was the faculty representative for the minority students and the sub-regional director of the Black American Law Student Association. Judge Moss and her attorney husband were married in 1987. She has one son and one stepson.

Judge Moss began her legal career as a public defender in the Gary City Court. After one year as a public defender, she became a deputy prosecutor in the Gary City Court and began a private law practice with an emphasis in labor law and personal injury law. From 1983 through 1989, she was Chief Deputy Prosecutor. From 1989 to January 1993, she was the Deputy Director of the Child Support Division of the Lake County Prosecutor's Office. In February 1993, she was appointed by Governor Evan Bayh as Judge of the Lake Superior Court, County Division.

The court over which she presides has small claims and civil jurisdiction with the maximum judgment of \$10,000. The criminal portion of her court handles town and city ordinances, misdemeanors and class D felonies.

Judge Moss is a member of the James C. Kimbrough Law Association, where she served as Vice-President from 1985 through 1989. She was a member of the Association of Trial Lawyers of America from 1981 to 1993. Judge Moss is the District 1 representative of the Board of Directors of the Indiana Judicial Conference; member of the Judicial Ethics Committee; member of the Lake County Bar Association's Library and Judicial Facilities Committee and Legislative Committee; and a member of the Supreme Court Committee of Women in the Judiciary.

MARY BETH BONAVENTURA

Judge of the Lake Superior Court

Juvenile Division

April 1, 1993 - To Date

Term Expires: December 31, 1998

D.O.B.: July 12, 1954

Republican



On April 1, 1993, Mary Beth Bonaventura was appointed by Governor Evan Bayh to the Lake Superior Court, Juvenile Division, in Lake County, Indiana. She became the second woman to sit as a judge of this particular court and the forty-sixth woman to sit as a trial judge in the State of Indiana.

Judge Bonaventura has been a Lake County resident all of her life. She was born in East Chicago, Indiana, and attended Bishop Noll Institute in Hammond, Indiana, for her high school education. She attended Marian College in Indianapolis, graduating in 1976 with a Bachelor of Arts in Psychology. Judge Bonaventura then attended Northern Illinois University where she graduated with her law degree in 1981.

After graduating from college, Judge Bonaventura became a probation officer. She worked in the Lake County Court, Division Two. While she was working as a probation officer, she realized that she wanted to be an advocate instead of a passive participant, so she attended law school. After law school, she was first employed as a referee in the Lake County Juvenile Court. An opening on that court came about as a result of another woman judge losing a retention election. Judge Bonaventura applied for the position at that time because she felt that she had the qualifications and the experience for doing the job. She had competition for the job from one male and one female, but had strong support from both men and women for the position. The Lake Superior Court now has thirteen judges, and Judge Bonaventura became the second woman judge sitting in that Court.

Since 1986, Judge Bonaventura has served as Executive Advisor for the Court Appointed Special Advocate Program and is a member and serves on the Board of Directors of the Indiana Council of Juvenile and Family Court Judges. She worked on the Indiana Juvenile Benchbook Committee preparing a new edition of the benchbook on juvenile justice. She is now a member of the Juvenile Justice Improvement Committee which was established to strive for improvements in the Juvenile Code. She is also a member of the Lake County Community Corrections Advisory Board.

Judge Bonaventura is active not only in judicial associations, but also in her

local bar association and community organizations. In 1982, she received recognition from the Lake County bar for her dedicated work. In 1989 Judge Bonaventura became a Director of the Justinian Society of Lawyers, Northwest Chapter, after previously serving in other offices. In 1991, she received a recognition award from the Hoosier Boys Town for outstanding service to children and presently serves as a member of the Board of Directors of the Boys and Girls Clubs of Northwest Indiana and the Board of Directors of the local American Red Cross. In 1994, Judge Bonaventura received the Morton Kanz Award which was presented by Tri-City Community Mental Health. The award was in recognition of Judge Bonaventura's efforts and dedication toward improving community mental health.

Judge Bonaventura specializes in juvenile law by choice and hopes to continue the implementation of new programs and exploring new avenues for assistance in the juvenile area.

ROSEMARY HIGGINS BURKE

Judge of the Fulton Superior Court

July 1, 1993 - To Date

Term Expires: December 31, 2000

D.O.B.: January 6, 1943

Democrat



Rosemary Higgins Burke was appointed to the Fulton Superior Court in July of 1993 by Governor Evan Bayh, becoming the forty-seventh woman to sit as a trial judge in the State of Indiana. Judge Burke graduated from Kalamazoo Central High School in Kalamazoo, Michigan. Judge Burke received a diploma in nursing in September 1963 from the Bronson Methodist Hospital School of Nursing. Judge Burke practiced nursing on and off for a number of years and completed a Bachelor of Business Administration *summa cum laude* in April of 1984 at Nazareth College in Kalamazoo in Nazareth, Michigan. She also obtained a Master of Science in Administration from the University of Notre Dame in 1987. She was married from 1963 to 1983.

Judge Burke remarried in 1987. She is a mother of four children, stepmother of two, and a grandmother of three. Her husband, daughter, and son-in-law are attorneys, and a stepdaughter is currently attending law school. Judge Burke is thought to be the first woman judge in Indiana to swear her own daughter in as a member of the Indiana bar when she administered the oath to Bridget Ryan Sommer on January 2, 1995.

Judge Burke was working in healthcare finance and nursing home administration when she became frustrated with her employment. After one particularly frustrating day, her husband suggested that she go to law school. She obtained an LSAT application the next day. Her daughter, a law student at that time, and her husband, an attorney, were very encouraging to her. She was admitted to Notre Dame Law School and received her J.D. in May 1992. In October 1992, Judge Burke was the winner of the First Annual Cynthia Northup Memorial Essay Contest sponsored by The American Association of Nurse Attorneys' Forum with a paper entitled "Towards Congruity in the Legal and Ethical Basis for Nursing Practice."

After law school, Judge Burke entered a general law practice with her husband. She worked in dissolutions, small claims, estates, and CHINS actions. She had not considered going on the bench until a new superior court was created in Fulton County. There was concern at that time in the small local bar association

about who was available to serve. Her husband, other attorneys, and another woman judge actively encouraged her to seek the appointment.

In Fulton County, Lisa Traylor-Wolff had presided over the county court that existed prior to the establishment of the superior court. Judge Traylor-Wolff was appointed to the newly created Pulaski Superior Court and, thirteen months after her graduation from law school, Judge Burke was appointed to the Fulton Superior Court. She was elected without opposition in 1994.

As with most judges, Judge Burke is more comfortable with the legal work required by a judge than the administration necessary to run a court. She thinks that the most challenging aspect of her career to date is maintaining a sense of humor while working with extremely limited resources.

Judge Burke is the President of the Board of Trustees of the Fulton County Leadership Academy and a past member of the United Way Board of Directors and the Hearthstone Community Hospice Board of Directors.

HEATHER M. MOLLO

Judge of the Brown Circuit Court

December 13, 1993 - to Date

Term Expires: December 31, 1996

D.O.B.: February 11, 1955

Democrat



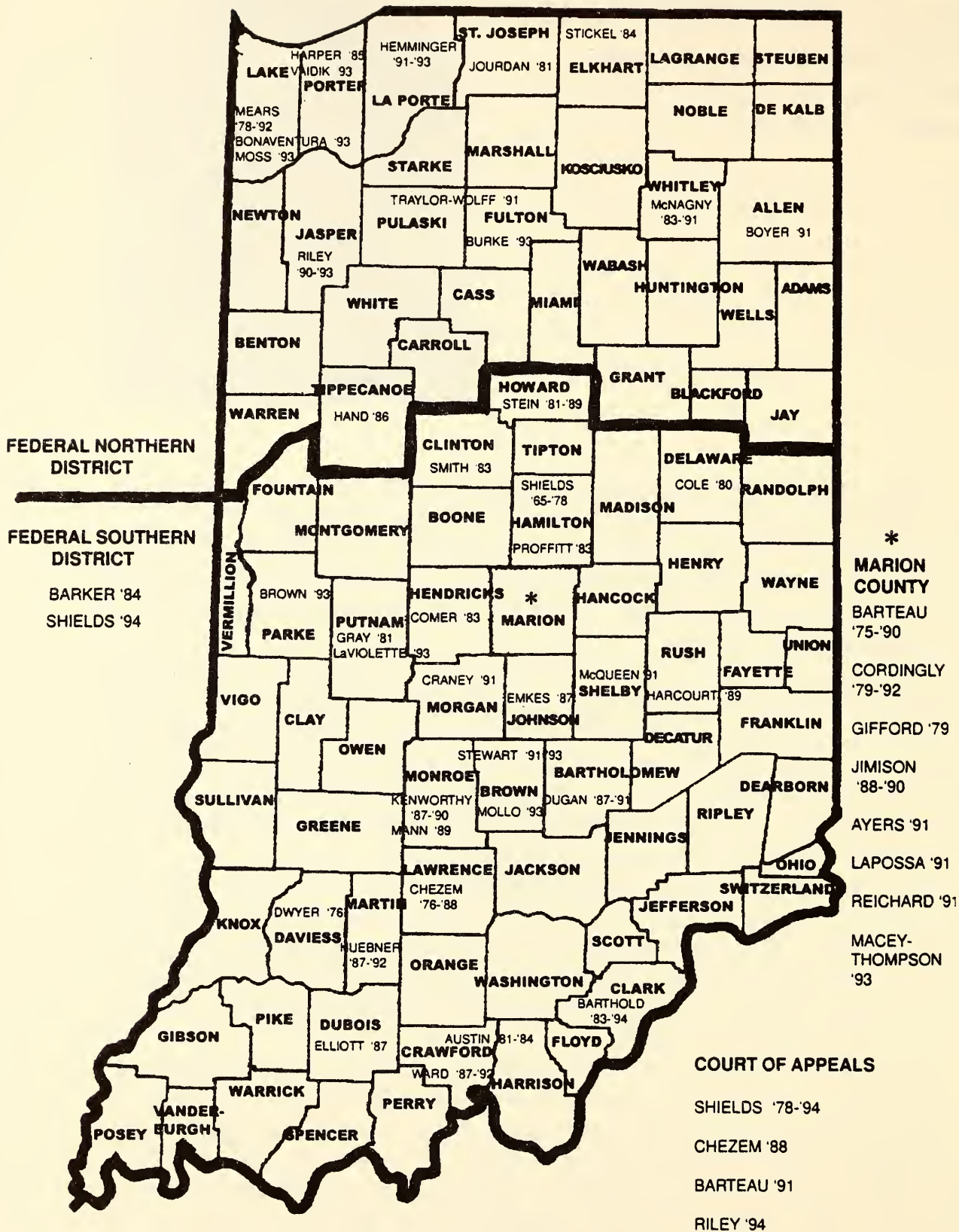
Governor Evan Bayh appointed Heather M. Mollo as Judge of the Brown Circuit Court to complete the term of former Judge Judith Stewart, who resigned to take an appointment as the U.S. Attorney for the Southern District of Indiana. Upon her appointment, Judge Mollo became the forty-eighth woman to serve as a trial judge in the State of Indiana. She and her husband, Steven Anthony Mollo, are the parents of two children.

Judge Mollo graduated *cum laude* from Franklin College in May of 1977 with a Bachelor of Arts in Psychology. From May of 1977 to August of 1980, she was the Director of CETA, a Title IIB Program with the Interlocal Association of Johnson, Brown and Bartholomew Counties. She graduated in May of 1983 from Indiana University School of Law—Bloomington with her J.D. She started a private law practice in Nashville, Indiana, with an emphasis in real estate, family law, and litigation. She is also a qualified mediator.

While practicing law, Judge Mollo held several positions: she was a part-time deputy prosecutor for Brown County; a part-time public defender for Brown County; referee of the Brown Circuit Court; and Counsel for the Brown County Office of Family and Children. Judge Mollo also served as Counsel for both the Commissioners of Brown County and the Board of Directors of the Brown County Solid Waste Management District.

Judge Mollo is a member of the Brown County, Indiana State, and American Bar Associations and has served as the Brown County Bar Association President.

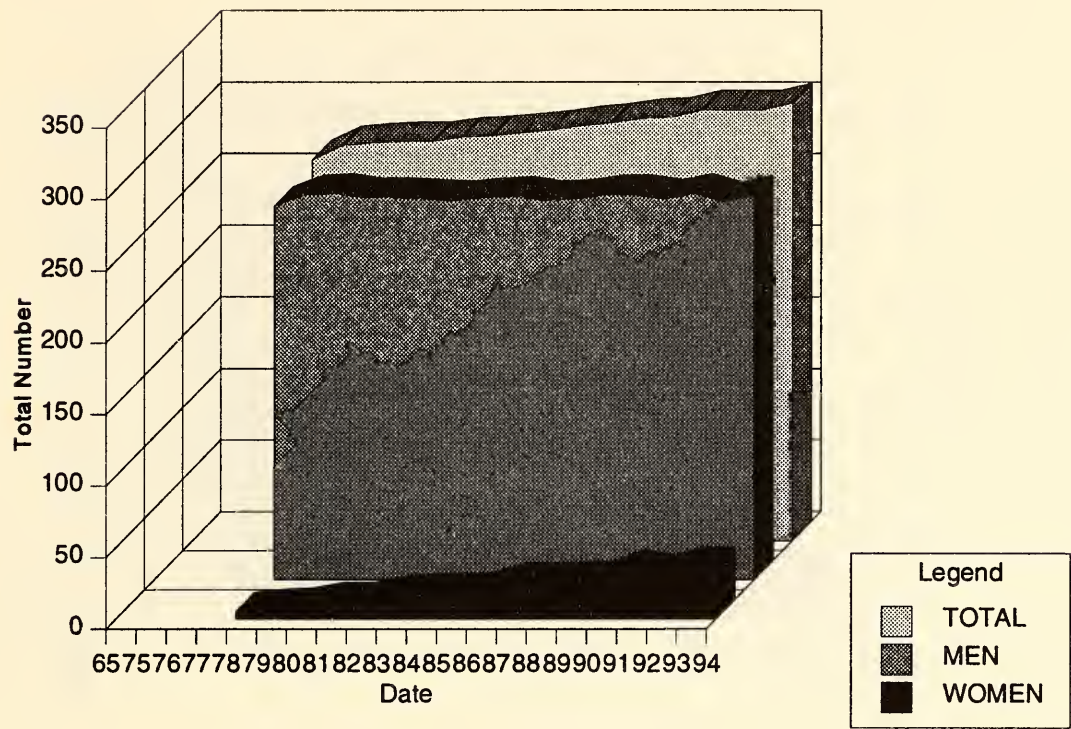
Judge Mollo has been active in civic organizations as well. She was a member of the Business and Professional Women's Club for a number of years, serving as State District Director, Brown County Club President and the Indiana Young Careerist in 1984. She also served as a member of the Board of Directors of the Brown County Convention and Visitor Bureau, Board of Directors of the Brown County Art Gallery and the Nashville Elementary Parent Teachers Organization.



APPENDIX D: GEOGRAPHICAL DISTRIBUTION OF INDIANA WOMEN JUDGES

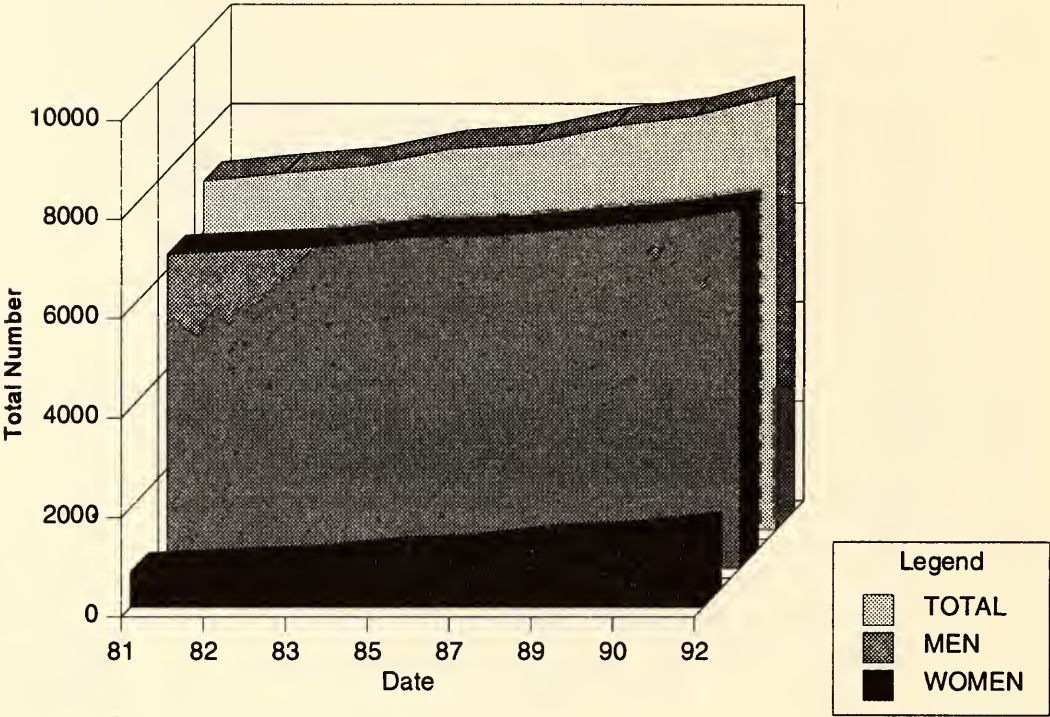
APPENDIX E

INDIANA JUDGES



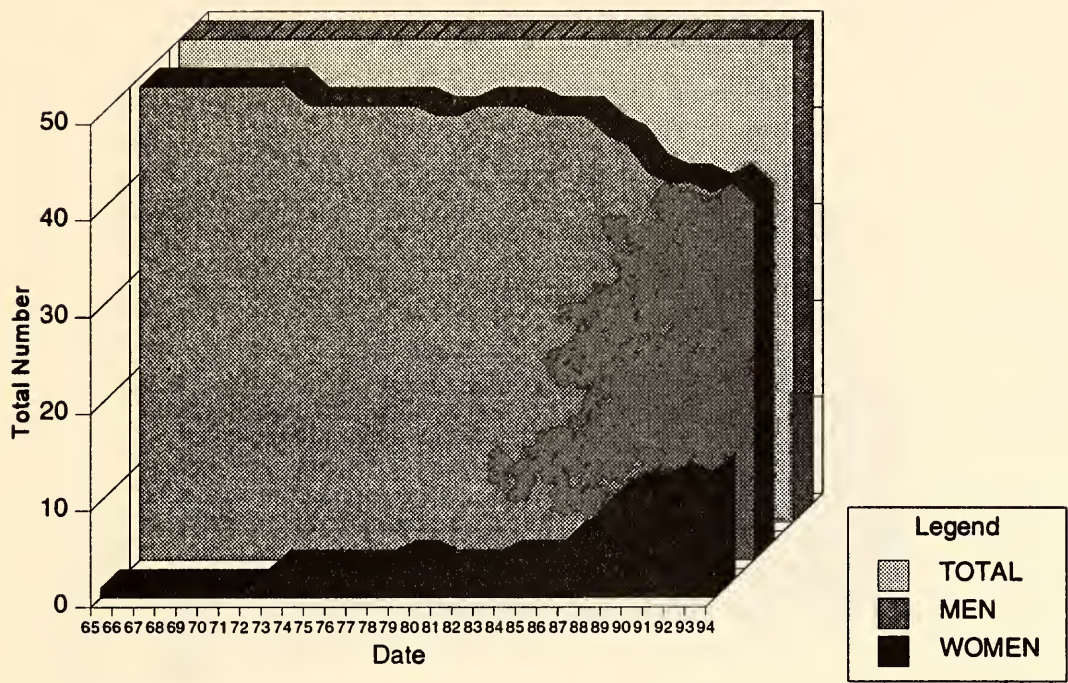
APPENDIX F

INDIANA DOCTORS

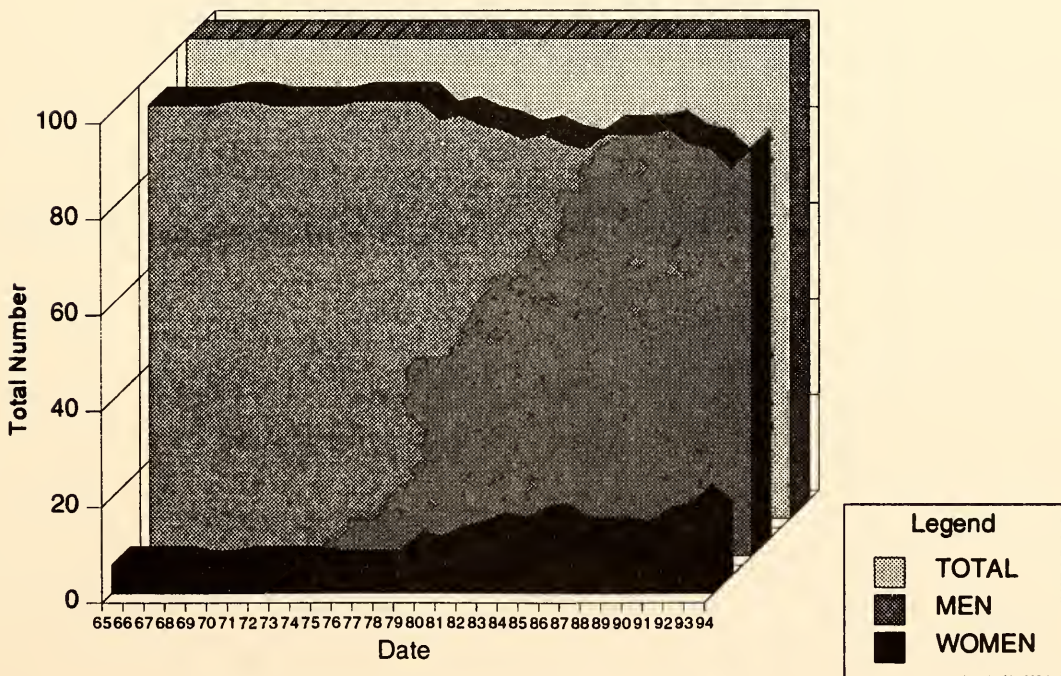


APPENDIX G

INDIANA
STATE SENATORS

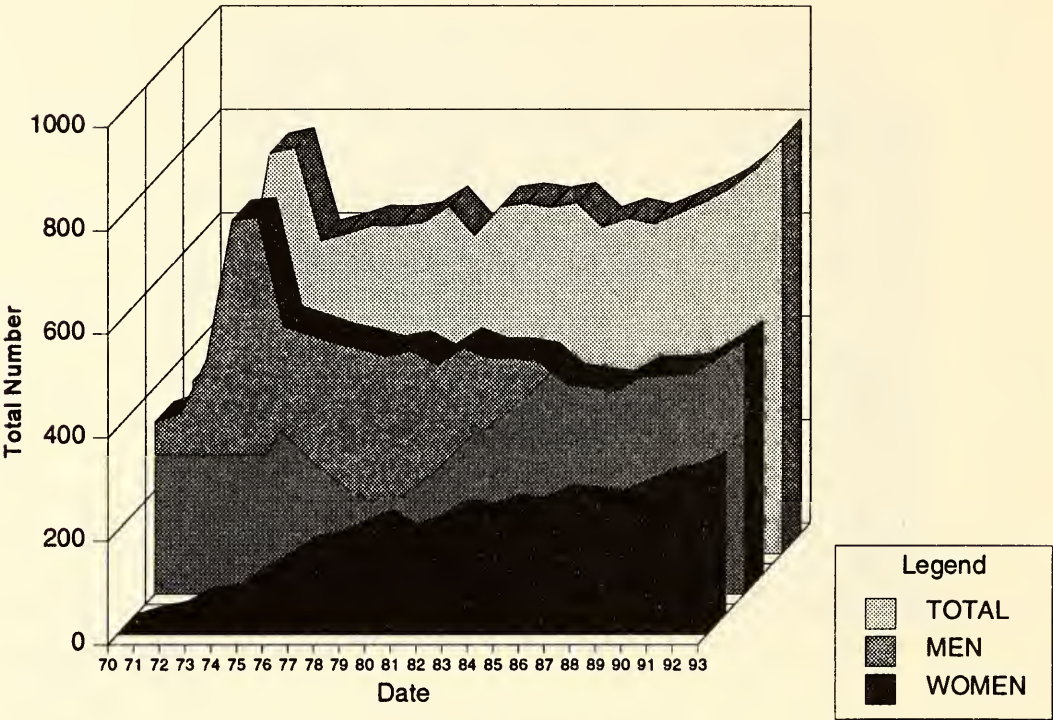


INDIANA
HOUSE OF REPRESENTATIVES



APPENDIX H

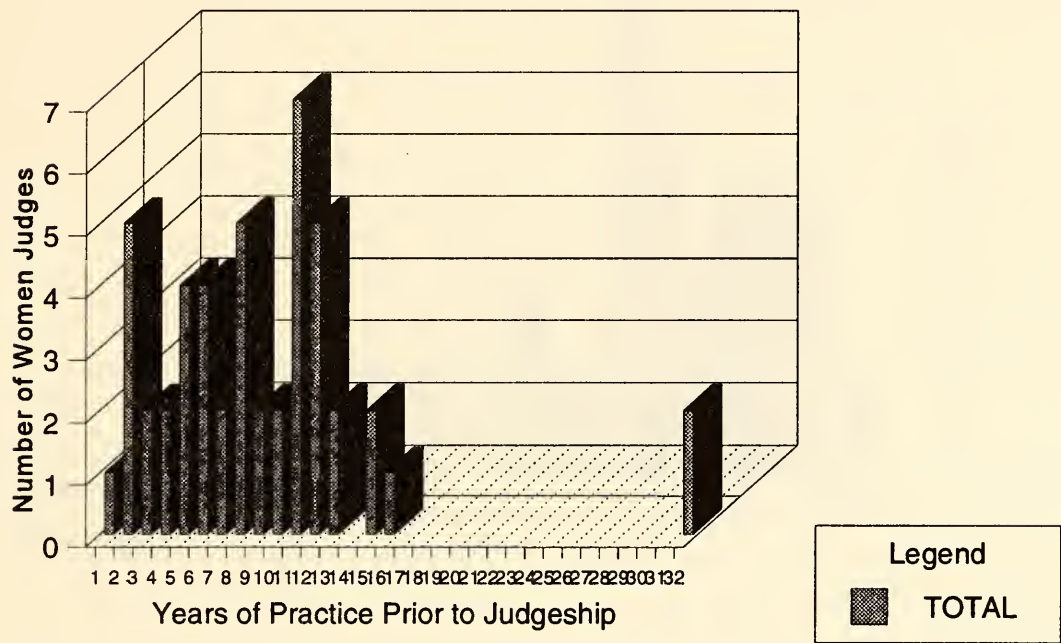
INDIANA LAW GRADUATES



APPENDIX I

YEARS OF PRACTICE*

Prior to Bench

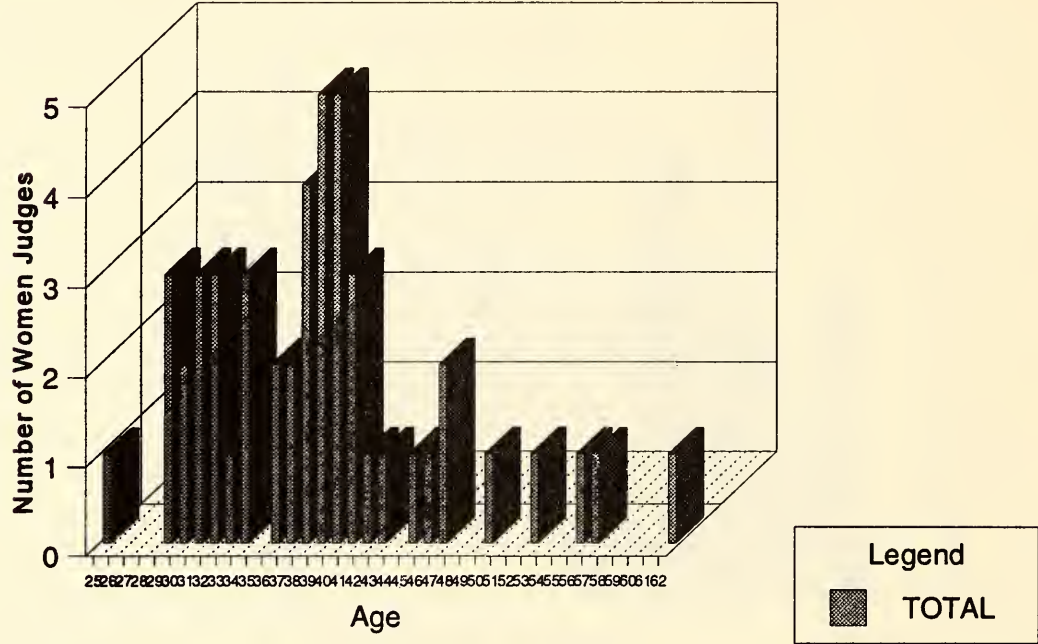


*Information obtained from Questionnaires and public records and personal interviews made by this author and graphically summarized above.

APPENDIX J

INDIANA WOMEN JUDGES*

Ages Assuming Judgeships



*Information obtained from Questionnaires and public records and personal interviews made by this author and graphically summarized above.

THE HISTORY OF THE COURT OF APPEALS OF INDIANA

JUDGE ROBERT H. STATON*
GINA M. HICKLIN**

INTRODUCTION

Two significant developments surround the history of the Court of Appeals of Indiana. One development involves its birth and struggle to exist as a part of the judicial landscape. The other development is its growth in jurisdiction and number of judges. It was the latter that finally allowed the supreme court to become a court of last resort as it intended from its inception in 1816.

In the beginning, the supreme court served double functions. It functioned as the sole appellate processing and clearing house for the young Indiana society and government. Its second and most important function, acting as a court of last resort and fashioning principles of law, was hindered considerably by a rapidly growing caseload.

Early Indiana history reflects a lack of appreciation by the legislature of the most important function of the supreme court. When the appellate caseload became overwhelming, the legislature provided commissioners, on a very limited basis, to give temporary relief.¹ Later, an appellate court was provided to alleviate the caseload problem; however, it was on a limited and temporary basis.² As a result, the supreme court was never given an opportunity to fully exercise its law-making function. Too, history reflects a lack of understanding on the part of the legislature regarding the importance of a court of last resort. On several occasions, the legislature made the new appellate court a court of last resort.

After the appellate court became permanent, it grew in size and jurisdiction. One temporary adjustment in its jurisdiction by the legislature later proved to shackle the supreme court and, in the 1970s, strangled the supreme court's law-making ability. The legislative jurisdictional adjustment gave the appellate court temporary criminal jurisdiction.³ When the temporary jurisdiction ended, all of the criminal jurisdiction was transferred to the supreme court. The appellate court then handled only civil appeals.⁴ When the constitution was amended in 1970, it expanded and reorganized the appellate court as a constitutional court.⁵ With the increase in the number of criminal appeals, the supreme court at that time spent approximately ninety-three percent of its time handling criminal cases which left

* The Honorable Robert H. Staton, Court of Appeals of Indiana, Third District; B.A., Indiana University; J.D., Indiana University School of Law—Indianapolis. Judge Staton has been on the court for twenty-five years and has written more than 2500 majority opinions.

** Law clerk to the Honorable Theodore R. Boehm, Supreme Court of Indiana, 1996; law clerk to the Honorable Robert H. Staton, Court of Appeals of Indiana, 1995; B.A., 1990, California State University, Fullerton; J.D., 1995, Indiana University School of Law—Indianapolis.

1. Act of Apr. 14, 1881, ch. 17, 1881 Ind. Acts 92 (expired 1883).
2. Act of Feb. 28, 1891, ch. 37, § 1, 1891 Ind. Acts 39, 39-40 (repealed 1971).
3. Act of Mar. 12, 1929, ch. 123, § 1, 1929 Ind. Acts 429, 429 (repealed 1963).
4. *Id.*; *In re* Petition to Transfer Appeals, 174 N.E. 812 (Ind. 1931).
5. IND. CONST. art. VII, § 5.

the development of the law in civil cases solely to the court of appeals as a court of last resort.⁶ The most important function of the supreme court, reshaping the common law and devising new principles of law, had been completely frustrated.

In 1988, Proposition Two amended the Indiana Constitution so that much of the criminal caseload pending in the supreme court would be shifted to the court of appeals.⁷ With the expansion of the number of districts and judges on the court of appeals, the judicial systems of Indiana were finally placed in balance. The supreme court was finally able to fully function as a court of last resort. At the same time, the court of appeals was able to manage the ever-menacing appellate caseload which had plagued the supreme court since its inception. In 1995, the court of appeals handed down 1825 majority opinions.⁸ From the time these appeals are fully briefed and ready for decision making, the average handdown time is only several months—one of the most outstanding appellate court performances in the United States.⁹

Section I of this article explores the birth and struggle of the appellate court. An attempt is made to cover the priorities of the legislature in coping with a limited economy and an infant government structure as well as the rapid increase of demands upon the judiciary. Section II covers in greater detail the expansion of jurisdiction which at times appeared to ignore the constitutional concept that the supreme court was a court of last resort. Section III explains the expansion from five to fifteen judges on the court. It covers their qualifications for appointment and manner of selection. The selection of a chief judge and of the presiding judges on the court are also reviewed, and a short explanation of the assignment of cases is covered. Section IV discusses the concept of districts. Originally, the district concept was applied to the supreme court and was later borrowed by the legislature as a platform for the court of appeals. The retention of judges and how the retention process is related to the districts are covered. Finally, section V discusses the publication of opinions. In addition, this section addresses memorandum decisions or unpublished opinions and the debate over citing them as authority.

I. THE APPELLATE COURT'S STRUGGLE FOR EXISTENCE

The Northwest Territory frontiersmen were faced with political indecision, an inadequate tax base, and a sparse population when they petitioned Congress for Indiana statehood in 1815. In 1816, when President Madison signed the congressional resolution making Indiana the nineteenth state in the Union, Indiana surpassed the statehood population requirement of 60,000 by only 3897.¹⁰ The budget for the territory had been \$10,000, two-thirds of which had been

6. Jack Averitt, *Amendment Would Ease High Court's Load*, INDIANAPOLIS NEWS, Apr. 14, 1988, at B1.

7. IND. CONST. art. VII, § 4.

8. COURT OF APPEALS OF INDIANA, 1995 ANNUAL REPORT 1 (1996).

9. *Id.*

10. JAMES H. MADISON, *THE INDIANA WAY* 50 (1986).

contributed by the federal government.¹¹ Statehood meant that the federal subsidy of \$6600 would vanish, and taxes would have to be drastically increased. Opponents to statehood argued for delaying statehood until Indiana was more populated and economically mature.¹² Governor Thomas Posey, who had been appointed governor of the territory by President Madison in 1813, believed that statehood should wait because of “a very great scarcity of talents, or men of such information as are necessary to fill the respective Stations, & offices of government.”¹³ Despite the opposition, Indiana became a state and little time was wasted filling “the Stations, & offices of government.”

The first Indiana Constitution created one supreme court with three judges and seven circuit courts. The constitution made no mention of an intermediate appellate court.¹⁴ The legislature vested the supreme court with jurisdiction in all cases in law and equity. Not long after statehood, the supreme court acquired a reputation that it could not cope with its workload.¹⁵ There was a chronic two or three-year delay in handing down decisions. Moreover, the opinions were tedious, lengthy and demonstrated an unwarranted fascination with meaningless technicalities.¹⁶

Over the next few decades, many of the people migrating westward settled in Indiana. Coupled with this wave of migration was the rapid spread of railroads. This drastic change in transportation brought about the immigration of people from farms to urban areas. Manufacturing was erupting over the landscape, and the shadow of the industrial revolution was cast on the horizon. James Whitcomb, Paris C. Dunning, and finally in 1849, Joseph A. Wright, all Democrats, had succeeded each other as governors of Indiana. The 1816 Constitution which reflected a liberal Jeffersonian spirit had become outdated in the wake of Jacksonian democracy. In the mid-1840s, a rumbling could be heard from all segments of society for a constitutional convention. Indiana had outgrown its constitution—the 1816 Constitution was suited for a much younger state.¹⁷ In the spirit of Jacksonian democracy, limitations on government and tenure of office gained popular appeal. This would mean the election of all officials by popular vote, including judges—a cardinal tenet of the Jacksonian philosophy.¹⁸

11. *Id.*

12. *Id.*

13. MADISON, *supra* note 10, at 50 (quoting Donald F. Carmony, *Fiscal Objection to Statehood in Indiana*, IND. MAG. HIST., XLII, Dec. 1946, at 317).

14. The first state constitution provided: “The judiciary power of this state, both as to matters of law and equity, shall be vested in one supreme court, in circuit courts, and in *such other inferior courts* as the general assembly may from time to time direct and establish.” IND. CONST. of 1816, art. V, § 1 (emphasis added).

15. 1 LEANDER J. MONKS, COURTS AND LAWYERS OF INDIANA 181 (1916).

16. 1 *id.* at 258-59.

17. 2 JOHN BARNHART & DONALD F. CARMONY, INDIANA, FROM FRONTIER TO INDUSTRIAL COMMONWEALTH 85 (1954); William W. Thorton, *Laws of Indiana as Affected by the Present Constitution*, IND. MAG. HIST., I, 1905, at 27-32.

18. 2 BARNHART & CARMONY, *supra* note 17, at 92-94.

By 1850, the population of Indiana had increased to almost one million.¹⁹ Times and attitudes had changed. The stress of industrialization provided the potential for class conflict and radical change.²⁰ The backlog of cases in the supreme court continued to rise. The need for an intermediate appellate court was becoming apparent, but there would be no provision for it in the new constitution. The struggle to exist was still ahead.

On November 1, 1851, the new Indiana Constitution was ratified. The new judiciary article provided for an increase in the number of supreme court judges—"not less than three, nor more than five."²¹ The judges would come from all sectors of the state because the constitution required that each judge reside in a separate district. However, the judges were elected by statewide ballot, rather than by district.²² The article also vested the court with jurisdiction in appeals and writs of error and with such original jurisdiction as the legislature may confer.²³ These changes reflected the Jacksonian philosophy and changing attitudes of the times.

In 1852, the legislature convened to implement the new constitution. The most notable statutes which affected the judiciary included: 1) the addition of a fourth supreme court judge; 2) the division of the state into four districts for the election of judges; 3) the creation of the office of reporter; and 4) the requirement that the court hold two sessions per year.²⁴

By the early 1870s, despite the addition of another judge, the supreme court continued to accumulate a tremendous backlog of cases. The docket became so congested that the general assembly convened a special session in December 1872. In an attempt to provide relief, the legislature added a fifth supreme court judge and created a fifth district.²⁵

By 1880, the population of Indiana increased to nearly two million.²⁶ From 1870 to 1880, the number of opinions handed down by the supreme court had increased by only slightly more than one hundred.²⁷ Adding two judges to the Indiana Supreme Court did little to hold back the crushing backlog of pending cases. Now that the supreme court had reached the maximum number of judges allowed by the constitution, the general assembly was forced to find other ways to

19. U.S. CENSUS OFFICE, SEVENTH CENSUS OF THE UNITED STATES: 1850, at cxxxvi, 1022 (Washington, Robert Armstrong, Public Printer, 1853), *microformed on* United States Decennial Census Publication 1790-1970.

20. MADISON, *supra* note 10, at 167.

21. IND. CONST. art. VII, § 2 (as adopted 1851) (amended 1970).

22. *Id.* § 3 (as adopted 1851) (amended 1970).

23. *Id.* § 4 (as adopted 1851) (amended 1970).

24. 1 MONKS, *supra* note 15, at 246; Act of Feb. 19, 1852, ch. 20, 1852 Ind. Acts 100 (superseded); Act of Feb. 28, 1855, ch. 42, 1855 Ind. Acts 90 (superseded).

25. 1 MONKS, *supra* note 15, at 259; Act of Dec. 16, 1872, ch. 20, 1872 Ind. Acts 25 (repealed 1971).

26. George T. Patton, Jr., *Recent Developments in Indiana Appellate Procedure: Reforming the Procedural Path to the Indiana Supreme Court*, 25 IND. L. REV. 1105, 1113 n.52 (1992).

27. *Id.* at 1113 n.53.

reduce the court's burgeoning caseload. In 1881, the legislature took two big steps to alleviate the supreme court's congested docket.

First, with the thought of adding another court, the legislature initiated a constitutional amendment—a seemingly insignificant change that was to change the judicial landscape in the years to come. The 1851 constitution provided: “The Judicial power of the State shall be vested in a Supreme Court, in Circuit Courts, *and in such inferior Courts* as the General Assembly may establish.”²⁸ The amendment substituted the word “other” for the word “inferior.”²⁹ The supreme court's earlier interpretation of the phrase “such inferior courts” implied that the legislature could not create courts on a parity in rank and jurisdiction with the circuit courts, such as an intermediate appellate court.³⁰

Second, the legislature created the Supreme Court Commission of 1881. In order to decrease the crushing caseload pressure on the supreme court, the legislature created a commission as a temporary solution, rather than establishing a permanent appellate court. The act which created the commission mandated the court to appoint five commissioners with each of the five judges appointing a commissioner from his district.³¹ The commissioners were to “aid and assist the Court in the performance of its duties” and would act “under such rules and regulations as the Court shall adopt.”³² The term of office of the commissioners was limited to two years because the legislature was advised that the supreme court was two years behind in its work.³³ Each commissioner received a salary equal to that of a supreme court judge. Each judge assigned cases to his commissioner who then prepared an opinion to be submitted for consideration by the full supreme court. The supreme court would accept, reject or modify the opinion.³⁴ Although this procedure appeared to save the judges time, they could not delegate their judicial responsibility to decide cases.

Because the backlog of cases did not completely disappear as planned, the legislature extended the life of the Supreme Court Commission for two more years.³⁵ By 1885, the court was relieved of its congested docket, and the legislature allowed the terms of the commissioners to expire. However, the relief enjoyed by the supreme court was short-lived. In only four years, the congestion reappeared to plague the supreme court. Several proposals were made to relieve

28. IND. CONST. art. VII, § 1 (as adopted 1851) (amended 1970) (emphasis added).

29. The amendment was ratified by the voters and made part of the constitution on March 14, 1881. However, the legislature proposed the amendment in 1877. The supreme court's decision in *State v. Swift*, 69 Ind. 505 (1880), that a constitutional amendment must pass by a majority of *all* voters, not just a majority of those voting on the amendment, delayed the ratification of the amendment. *Swift* was later overruled by *In re Todd*, 193 N.E. 865 (Ind. 1935).

30. *Cropsey v. Henderson*, 63 Ind. 268, 271 (1878); *Clem v. State*, 33 Ind. 418, 421 (1870). See also Patton, *supra* note 26, at 1112-13.

31. Act of Apr. 14, 1881, ch. 17, §§ 1-2, 1881 Ind. Acts 92 (expired 1883).

32. *Id.* § 1.

33. 1 MONKS, *supra* note 15, at 298.

34. 1 *id.* at 297-99.

35. Act of Mar. 3, 1883, ch. 60, 1883 Ind. Acts 77 (expired 1885).

the congestion, many of which included increasing the number of judges on the supreme court. Those proposals failed, and in 1889, the Supreme Court Commission was resurrected with one important difference. The commissioners were to be appointed by the general assembly instead of by the supreme court judges.³⁶ The change in appointments was prompted by bitter partisan differences. The Democratic Party, although it had regained control of both houses of the legislature, suffered a stinging defeat for the major state offices in the election of 1888. Thus, the legislature apparently wanted to create patronage and state offices for Democrats.³⁷ Governor Hovey, a Republican, thought the act was unconstitutional and vetoed the bill. The legislature ignored the governor's message, and both houses voted to override the veto.

The legislature then appointed five people to serve as commissioners. However, before they were allowed to open the doors of their offices, the Indiana Supreme Court declared the Act unconstitutional.³⁸ In an eloquent opinion authored by Chief Judge Byron Elliott, the court unanimously stated that the provisions of the 1851 Constitution:

[p]rescribe, define, and limit the powers of the other departments of government, remove all doubt, and make it incontrovertibly plain that the courts possess the entire body of the intrinsic judicial power of the state, and that the other departments are prohibited from assuming to exercise any part of that judicial power.³⁹

The supreme court made it abundantly clear that the constitutional duties of deciding legal disputes and writing opinions were to be strictly left to the court, not to the legislature.

By 1891, the caseload of the supreme court loomed large and insurmountable. Pending cases were engulfing the court. Although the 1881 constitutional amendment cleared constitutional obstacles, the cost of a second permanent appellate court gave the legislature reason to hesitate.⁴⁰ A temporary, second appellate court would be the compromise. Finally, Indiana had its first statutory intermediate appellate court.⁴¹

36. Act of Feb. 22, 1889, ch. 32, 1889 Ind. Acts 41.

37. JEROME L. WITHERED, A HISTORY OF THE SUPREME COURT OF INDIANA 168 (1983) (on file with the Indiana Supreme Court Library).

38. State *ex rel.* Hovey v. Noble, 21 N.E. 244 (Ind. 1889).

39. *Id.* at 246.

40. CHARLES W. TAYLOR, BENCH AND BAR OF INDIANA 79 (Indianapolis, Bench & Bar Publ'g Co. 1895).

41. Act of Feb. 28, 1891, ch. 37, §§ 1-27, 1891 Ind. Acts 39; *id.* §§ 1, 5 at 28, 41 (repealed 1971); *id.* §§ 2-4, 8, 10, 12, 13, 15, 16, 18-20, 24-25, 27 at 29-44 (superseded); *id.* §§ 6, 7, 9, 11, 17, 21, 22 at 41-43 (codified at IND. CODE §§ 33-3-1-3 to -6, -8 to -10 (1993)). In creating the appellate court, the Indiana General Assembly was not original or innovative. The concept of having an intermediate appellate court had been experimented with by a number of states. In 1844, New Jersey had an intermediate court with trial jurisdiction as well. N.J. CONST. of 1844, art. VI. Other states having an intermediate appellate court prior to 1891 included: New York, 1846; Ohio,

Then known as the Appellate Court of Indiana, its judges' terms were limited to four years.⁴² The cost-conscious legislature limited the life of the court to "six years from the first day of March, 1891, and no longer."⁴³ At the end of this period, the "Supreme Court shall assume jurisdiction of all causes pending in and other business of said Appellate Court as if this act had never been passed."⁴⁴

The new appellate court consisted of five judges, one from each of the five districts previously carved out for the Indiana Supreme Court.⁴⁵ Each judge was to receive a salary of \$3500 per year.⁴⁶ The governor appointed the first five judges of the court, only three of which could be selected from the same political party.⁴⁷ Those judges served until they could stand for election.⁴⁸

The general assembly limited the types of appeals that the new appellate court judges would decide. The legislature granted the court final jurisdiction only in minor matters.⁴⁹ The statute provided:

When the Appellate Court shall be organized and ready to proceed with business, the Supreme Court shall, by an order entered upon its record, transfer to it all cases then pending in such Supreme Court of the nature and description of those of which jurisdiction is by this act given to said Appellate Court . . . , and the action of said Appellate Court shall have the same force and effect in all respects as if the said cause had been heard and disposed of by the Supreme Court.⁵⁰

Three of the five appellate judges had to concur in order to decide a case or to make any order of the court.⁵¹ Although the statute did not authorize the supreme court to review any decision made by the appellate judges, an exception to this rule occurred when one of the five judges on the court had a conflict of interest when considering an appeal. The statute then provided that the judge could not participate. If there was a tie among the remaining four judges, the appeal would have to be certified to the supreme court and decided as if it had been originally appealed to that court.⁵²

The statute also stated that the appellate court "shall be a Court of Record and

1852; Missouri, 1855; Illinois, 1877; Louisiana, 1879; and Kentucky, 1882. See N.Y. CONST. of 1846, art VI, § 2; OHIO CONST. art. IV; Act of Mar. 23, 1852, 1852 Ohio Laws 93; MO. CONST. of 1875, art. VI, §12; ILL. CONST. of 1870, art. 6, § 11; LA. CONST. of 1879, arts. 80, 95-97, 101; Act of May 5, 1880, ch. 1525, 1880 Ky. Acts 798.

42. Act of Feb. 28, 1891, ch. 37, § 3, 1891 Ind. Acts 39, 40 (superseded).

43. *Id.* § 26 at 44.

44. *Id.*

45. *Id.* § 4 at 40.

46. *Id.* § 16 at 43.

47. *Id.* § 2 at 40.

48. *Id.* § 3.

49. *Id.* § 1 at 39-40; see discussion *infra* Part II.

50. *Id.* § 19 at 43.

51. *Id.* § 21.

52. *Id.*

shall have all the powers of the Supreme Court to punish for contempt of its authority, and to enforce its judgments and orders, which judgments shall be liens, as are judgments of the Supreme Court."⁵³ What is remarkable is that the appellate court was made a court of record. There is no indication that the supreme court was a court of record except through its clerk's docket and its written opinions.

A time limit for deciding appeals was also placed upon the newly created court. If an appeal had not been taken up for consideration within one year after its submission, on a motion by either party, the appeal could be certified to the supreme court as if it had been originally submitted to the supreme court.⁵⁴ However, this provision could potentially work against the party attempting to remove the case to the supreme court. The supreme court had its own backlog of cases and a reputation of two-year delays. After a year had passed on the appellate court, a party could move to certify the case to the supreme court where the appeal could remain unresolved for another two years.

In 1893, the legislature realized that the jurisdiction of the appellate court was not broad enough. Two years after the appellate court was created, the supreme court was still overloaded with appeals.⁵⁵ Thus, the legislature amended the 1891 act by increasing the amount in controversy from \$1000 to \$3500.⁵⁶ The legislature also changed the appellate court's limited jurisdiction by adding some exceptions.⁵⁷

In 1897, the legislature extended the life of the appellate court for four additional years.⁵⁸ Then, in 1899, the legislature added another two years, which extended the court's temporary life to 1903.⁵⁹ Finally, in 1901, before the term of the court was allowed to expire, the legislature made the appellate court a permanent fixture on the judicial landscape.⁶⁰

The 1901 statute which made the appellate court permanent also gave the court an additional judge.⁶¹ The court's function began to shift from a court of last resort to an intermediate appellate court. The legislature divided the state into two districts, designated as the Appellate Court of Indiana, Divisions Number One and Two.⁶² The previous statutes specified cases over which the appellate court had final jurisdiction. However, the 1901 act provided that "[n]o appealable case shall hereafter be taken directly to the Supreme Court unless it be within" a list of nine classes of appeals.⁶³ Another notable change was that appeals decided by the appellate court could be transferred to the supreme court in certain circumstances.

53. *Id.* § 10 at 42.

54. *Id.* § 25 at 44.

55. TAYLOR, *supra* note 40, at 55.

56. Act of Feb. 16, 1893, ch. 32, sec. 1, § 1, 1893 Ind. Acts 29, 29-30 (repealed 1971).

57. *Id.*

58. Act of Jan. 28, 1897, ch. 9, § 3, 1897 Ind. Acts 10, 10 (repealed 1901).

59. Act of Feb. 7, 1899, ch. 22, § 1, 1899 Ind. Acts 24, 24-25 (repealed 1901).

60. Act of Mar. 12, 1901, ch. 247, § 19, 1901 Ind. Acts 565, 570 (superseded).

61. *Id.* § 2 at 565 (repealed 1971).

62. *Id.*

63. *Id.* § 9 at 566 (repealed 1971).

A basic procedure for transfer was created which has survived to the present.⁶⁴

It took another seventy years before the appellate court finally became a constitutional court. The first section of the judiciary article of the Constitution was amended to state: "The judicial power of the State shall be vested in one Supreme Court, one Court of Appeals, Circuit Courts, and such other courts as the General Assembly may establish."⁶⁵ Thereafter, the appellate court became officially known as the Court of Appeals of Indiana.

II. THE JURISDICTION EVOLUTION

The gradual inflation of the jurisdictional balloon for the Appellate Court of Indiana developed grudgingly. In the beginning, the jurisdiction of the court was extremely limited due to the fact that the appellate court was seen as a temporary measure to reduce the backlog of supreme court cases. But as times changed and the number of appeals increased, the jurisdiction of the appellate court expanded. In 1995, the fifteen-judge court of appeals handed down a record number of decisions—1825 majority opinions.⁶⁶

Looking back to 1891, the legislature granted the new appellate court *final* jurisdiction in minor matters including: all cases for recovery of less than \$1000; all appeals in cases of misdemeanors; appeals from justice of the peace judgments where the amount in controversy exceeded fifty dollars; recovery of specific personal property; all actions regarding recovery of the possession of leased premises; and all claims against decedents' estates.⁶⁷ This legislative grant of jurisdiction, although limited, made the appellate court a court of last resort. Suits in equity were not within the jurisdiction of the appellate court. Therefore, in cases where any relief beyond a money recovery was available, the entire case fell to the supreme court. This included "[s]uits for injunction, for the specific performance of contracts, for the rescission of contracts, . . . foreclosure of liens against real property . . ." and all similar cases.⁶⁸ In addition, the supreme court made it clear that the appellate court could only decide those cases specifically included in the 1891 act. In *Ex parte Sweeney*, the Indiana Supreme Court emphasized:

It is so evident that the act recognizes the general and superior appellate jurisdiction of the supreme court that little else is required than the bare statement that the appellate authority not expressly or impliedly vested in the newly-created tribunal remains where the constitution and the law place it, in the supreme court of the state. . . . [I]f the case is one of appellate cognizance, and it does not fall within one of the classes over

64. *Id.* § 10 at 567 (repealed 1971). See Patton, *supra* note 26, at 1119; see also discussion *infra* Part II.

65. IND. CONST. art VII, § 1.

66. COURT OF APPEALS OF INDIANA, 1995 ANNUAL REPORT 1 (1996).

67. Act of Feb. 28, 1891, ch. 37, § 1, 1891 Ind. Acts 39, 39-40 (repealed 1971); see also *Ex parte Sweeney*, 27 N.E. 127 (Ind. 1891).

68. *Sweeney*, 27 N.E. at 129-30.

which the appellate court is given jurisdiction, it is within the jurisdiction of the supreme court.⁶⁹

Because the jurisdiction of the appellate court was so limited, its existence did little to help alleviate the backlog of cases the supreme court had accumulated on its docket. The legislature jumped in again and, in 1893, attempted to bail out the supreme court by increasing the jurisdiction of the appellate court. The 1893 amendment increased the amount in controversy from \$1000 to \$3500.⁷⁰ In addition, the appellate court was given "exclusive jurisdiction" of appeals from the circuit, superior, and criminal courts subject to these exceptions: 1) constitutionality of federal or state statutes or a municipal ordinance; 2) suits in equity (e.g., injunctions and writs of mandate or prohibition); and 3) cases where title to real estate was at issue.⁷¹ Too, the appellate court was to certify cases which fell into these categories to the Indiana Supreme Court.

In 1901, the legislature attempted to place a tighter rein on the cases that were appealable to the supreme court. Rather than specifying the cases over which the appellate court had final jurisdiction, as had prior statutes, the 1901 act provided that no appeal could be taken directly to the supreme court unless it fell within a list of nine classes of appeals.⁷² All other appealable cases were to be taken to the appellate court.⁷³

In addition, for the first time, the legislature provided a procedure for transfer from the appellate court to the supreme court—a basic procedure which remains with us today.⁷⁴ A party could file an application for transfer of the appeal to the supreme court on the following grounds: 1) the appellate court's opinion contravened a ruling precedent of the supreme court; 2) the appellate court erroneously decided a new question of law; 3) if two appellate court judges believed that a ruling precedent of the supreme court was erroneous; or 4) if the party lost in the appellate court and the amount in controversy exceeded \$6000.⁷⁵ The purpose of authorizing transfers was to give the supreme court "a revising hand over the opinions of the Appellate Court, when necessary, in order to control the declaration of legal principles."⁷⁶ Gradually, final jurisdiction began to slip

69. *Id.* at 127-28.

70. Act of Feb. 16, 1893, ch. 32, § 1, 1893 Ind. Acts 29, 29 (repealed 1971).

71. *Id.* at 29-30.

72. The nine classes of appeals included: 1) cases involving constitutional questions; 2) all prosecutions for felonies; 3) actions to contest the election of public officers; 4) cases of mandate and prohibition; 5) cases of habeas corpus; 6) actions to contest wills; 7) interlocutory orders appointing or refusing to appoint receivers, and interlocutory orders regarding temporary injunctions; 8) proceedings to establish public drains and to change or improve water courses; and 9) proceedings to establish gravel roads. Act of Mar. 12, 1901, ch. 247, § 9, 1901 Ind. Acts 565, 566 (superseded).

73. *Id.*

74. *Id.* § 10 at 567 (repealed 1971).

75. *Id.*

76. Patton, *supra* note 26, at 1119 (quoting *Ex parte France*, 95 N.E. 515, 520 (Ind. 1911)).

away from the appellate court.

During this decade, the legislature continued to make revisions to the jurisdiction of the appellate court. In 1903, the legislature added the requirement that in order to take an appeal to the appellate court or the supreme court, the amount in controversy must exceed fifty dollars.⁷⁷ The legislature also gave the right to appeal to defendants in criminal cases involving misdemeanors.⁷⁸ Could a defendant now appeal to the supreme or appellate court but the state could not? Two years later, in 1905, the legislature passed another act concerning criminal appeals. This time the general assembly clarified its intent stating that “in all criminal cases of misdemeanor, touching the sufficiency of an affidavit, information or indictment, or touching upon any question of law occurring upon the trial, the state shall have the right to appeal to the supreme or appellate courts”⁷⁹

In 1907, again the legislature amended the jurisdictional act. This time the general assembly provided that decisions of the juvenile court were appealable to the appellate court.⁸⁰ The legislature also expanded the list of types of cases directly appealable to the supreme court from nine to eighteen.⁸¹ Later in 1911, that list was expanded again to twenty-one types of cases.⁸² The legislature also

(citations omitted)).

77. Act of Mar. 9, 1903, ch. 156, § 1, 1903 Ind. Acts 280, 280-81 (codified at IND. CODE § 33-3-2-4 (1993)).

78. *Id.* § 2 at 281 (repealed 1971).

79. Act of Mar. 6, 1905, ch. 135, § 1; 1905 Ind. Acts 429, 429 (repealed 1978). *See* IND. CODE § 35-38-4-2 (1993).

80. Act of Mar. 9, 1907, ch. 136, § 1, 1907 Ind. Acts 221, 221-22 (repealed 1963).

81. The new classes of direct appeals to the supreme court included: 1) proceedings to construe wills, in which no other relief is asked; 2) condemnation proceedings for the appropriation of lands for public use; 3) judgments granting or denying licenses to sell intoxicating liquors; 4) prosecutions for contempt of the lower courts; 5) applications for admission to the bar and proceedings to disbar an attorney; 6) all cases wherein the amount in controversy exceeds \$6000; 7) interlocutory orders for the payment of money or to compel the execution of any instrument, or the delivery or assignment of any securities, evidences of debt, documents or things in action; 8) interlocutory orders for the delivery of the possession of real property or the sale thereof; and 9) interlocutory orders upon writs of habeas corpus. *Compare* Act of Mar. 12, 1901, ch. 247, § 9, 1901 Ind. Acts 565, 566 *with* Act of Mar. 9, 1907, ch. 148, sec. 1, § 9, 1907 Ind. Acts 237, 237-38 (repealed 1963). In addition, all criminal prosecutions could now be directly appealed to the supreme court. The prior act limited direct appeals to felony convictions.

82. In redefining the classes of direct appeals, the legislature added four classes and deleted one. The following classes were added: 1) all actions involving the title to real estate or the possession thereof; 2) all cases involving the granting or refusal to grant injunctions; 3) all cases for the specific performance of contracts; and 4) all probate matters. The legislature deleted the class which allowed direct appeals in any case wherein the amount in controversy exceeded \$6000. *Compare* Act of Mar. 9, 1907, ch. 148, § 1, 1907 Ind. Acts at 237-38 (repealed 1971) *with* Act of Mar. 3, 1911, ch. 117, § 1, 1911 Ind. Acts 201, 201-03 (repealed 1963).

abolished the amount in controversy requirement.⁸³ That same year, the legislature declared, "The jurisdiction of the appellate court in all cases in which jurisdiction is hereby conferred upon said court shall be *final*."⁸⁴ However, the jurisdiction of the appellate court was not final when two or more judges of the appellate court were of the opinion that the ruling precedent of the supreme court was erroneous.⁸⁵ In those instances, the case was transferred to the supreme court.

The legislative provision that gave the appellate court final jurisdiction went too far. Its attempt to grant additional jurisdiction to the appellate court and to cure the congestion of cases on the supreme court raised a serious constitutional question. In *Ex parte France*, the Indiana Supreme Court stated that when a constitution places a court at the head of the judicial system of the state, the legislature may not interfere with its existence or supremacy nor create a court of coordinate final jurisdiction.⁸⁶ Then again, in 1913, the supreme court struck down the final jurisdiction provision as unconstitutional.⁸⁷ In *Curless v. Watson*, the Indiana Supreme Court set forth the issue by stating, "[T]he question at issue is not what cases may be appealed to the Appellate Court, but can the legislature vest the Appellate Court with complete and final jurisdiction to review cases, under appeals or writs of error, without being subject to review by the Supreme Court?"⁸⁸ The court explained:

[t]he right to confer jurisdiction, in any particular case, is in the legislature, but the power to receive it is fixed by the Constitution in the Supreme Court, and the legislature has no right to vest any other tribunal with authority to take final jurisdiction in appeals and writs of error; that is '[t]o review errors of law arising upon the face of the proceedings, so that no evidence is required to substantiate or support it,' which is a power fixed by the Constitution in the Supreme Court.⁸⁹

83. Compare Act of Mar. 9, 1907, ch. 148, § 1, 1907 Ind. Acts at 238 (fourteenth enumerated class) with Act of Mar. 3, 1911, ch. 117, § 1, 1911 Ind. Acts 201, 201-03. However, in 1915, cases in which the amount in controversy exceeded \$6000 were made only appealable directly to the supreme court. Act of Mar. 6, 1915, ch. 76, § 1, 1915 Ind. Acts 149, 150 (repealed 1971).

84. Act of Mar. 3, 1911, ch. 117, § 4, 1911 Ind. Acts 201, 204 (repealed 1963) (emphasis added).

85. *Id.*

86. *Ex parte France*, 95 N.E. 515, 522 (Ind. 1911).

87. *Curless v. Watson*, 102 N.E. 497 (Ind. 1913). "The substance of the appellants' contention [was] that by abolishing the right of transfer, the act of 1913 makes the Appellate Court a tribunal of final appellate jurisdiction equal in rank with the Supreme Court [which is] unconstitutional and void." *Id.* at 502 (Spencer, C.J., concurring). The final appellate tribunal concept was carried forward from the 1891 legislation when it struck a reef in the 1913 legislation and was declared unconstitutional. Act of Feb. 28, 1891, ch. 37, § 1, 1891 Ind. Acts 39, 39-40 (repealed 1971).

88. *Curless*, 102 N.E.2d at 499.

89. *Id.* at 501.

In short, the supreme court held that the legislature may withhold jurisdiction in certain cases, but it cannot confer final jurisdiction upon any other tribunal to determine questions of law. The appellate court was no longer considered a court of last resort, rather it became an intermediate appellate court as it is today.

With the debate over whether the appellate court was a court of final resort decided, the jurisdictional changes subsided. In 1913 and 1915, the legislature again amended the list of types of cases directly appealable to the supreme court. In 1915, the list was shortened from twenty-one to eighteen types of appeals.⁹⁰

It was not until 1929 that the next notable change in the jurisdiction of the appellate court occurred. The legislature granted the appellate court temporary jurisdiction of all criminal appeals where the punishment was not death or imprisonment until January 1, 1931.⁹¹ The appellate court decisions in those cases were to be “final and conclusive” and not subject to transfer to the supreme court.⁹² Thus, the act purported to give the appellate court final jurisdiction over appeals from misdemeanor convictions. When the temporary jurisdiction of the appellate court ended, the act required that all pending criminal appeals be transferred to the supreme court. The supreme court upheld the constitutionality of the act.⁹³ However, ten years later, the supreme court repeated its doubts concerning the constitutional authority of the legislature to make a decision of the appellate court final.⁹⁴

The debate, which began in 1891, over whether the appellate court was an intermediate court subject to the supervisory power of the supreme court or a court of last resort regarding minor matters, finally came to an end in 1940. In *Warren v. Indiana Telephone Co.*, the Indiana Supreme Court stated:

Uniformity in the interpretation and application of the law is the keystone of our system of jurisprudence. . . . [U]niformity cannot be attained or preserved if the courts that interpret and apply the laws are not required to take their controlling precedents from some common source. If other courts than this court are to be permitted to construe statutes and state rules of substantive law, without recourse being provided for review by this court, the result will be as destructive to uniformity as if the Legislature was permitted to enact local and special laws for every county

90. In redefining the classes of direct appeals, the legislature added one new class and deleted four classes. The legislature reinstated the amount in controversy requirement for direct appeal, wherein the amount in controversy must exceed \$6000. The four deleted classes of appeals included: 1) all actions involving title to real estate; 2) all cases involving injunctions; 3) all cases for the specific performance of contracts; and 4) all probate matters. *Compare* Act of Mar. 3, 1911, ch. 117, § 1, 1911 Ind. Acts 201, 202-03 (repealed 1963) *with* Act of Mar. 10, 1913, ch. 166, § 1, 1913 Ind. Acts 454, 454-55 *and with* Act of Mar. 6, 1915, ch. 76, § 1, 1915 Ind. Acts 149, 150-51 (repealed 1971).

91. Act of Mar. 12, 1929, ch. 123, § 1, 1929 Ind. Acts 429, 429 (repealed 1963).

92. *Id.*

93. *In re* Petition to Transfer Appeals, 174 N.E. 812 (Ind. 1931).

94. *Warren v. Indiana Tel. Co.*, 26 N.E.2d 399, 405-06 (Ind. 1940).

in the state.⁹⁵

From that point on, the appellate court was known as an intermediate court of appeals.

As to the transfer process, the legislature seized the opportunity in 1933 to once again clarify the procedure. The general assembly reiterated that when two or more judges of the appellate court were of the opinion that the ruling precedent of the supreme court was erroneous, the case was to be transferred to the supreme court.⁹⁶ It also provided that the losing party could file a petition for rehearing with the appellate court. If that petition was denied, the party could file an application for transfer to the supreme court.⁹⁷ The grounds for transfer included: 1) the opinion of the appellate court contravened a ruling precedent of the supreme court; or 2) a new question of law was directly involved and decided erroneously.⁹⁸

Thereafter, the jurisdictional provisions remained basically the same for forty years, until the judiciary article of the Indiana Constitution was substantially amended in 1970. The revised article specifically provided for an intermediate appellate court, now known as the Indiana Court of Appeals.⁹⁹ The constitution conferred no original jurisdiction upon the court of appeals, except that the supreme court could authorize the court of appeals to directly review decisions of administrative agencies.¹⁰⁰ In all other cases, the court of appeals was to exercise jurisdiction in accordance with rules specified by the supreme court.¹⁰¹ For the first time, the constitution guaranteed the right to one appeal in all cases, including criminal cases. All appeals from a judgment imposing a sentence of death or life imprisonment, or for a term greater than ten years were taken directly to the supreme court.¹⁰²

Also in 1970, the Indiana Supreme Court promulgated the first Indiana Rules of Appellate Procedure.¹⁰³ The new appellate rules further solidified the position

95. *Id.*

96. Act of Mar. 8, 1933, ch. 151, § 1, 1933 Ind. Acts 800, 800 (repealed 1971).

97. *Id.* at 801.

98. *Id.*

99. IND. CONST. art VII, § 1.

100. *Id.* § 6.

101. *Id.*

102. *Id.* § 4 (as amended 1970) (amended 1981).

103. The 1969 legislature adopted Rules of Civil Procedure, effective Jan. 1, 1970. Act of Mar. 13, 1969, ch. 191, § 1, 1969 Ind. Acts 546, 546-715 (repealed 1984). It also reserved power to the Indiana Supreme Court to adopt rules and to rescind the rules adopted by the general assembly. *Id.* (codified at IND. CODE § 34-5-2-1 (1993)). The order of the court adopting these rules, instead of rescinding or abrogating the legislature rules stated in part, "The rules appended to this Order shall supersede all procedural statutes in conflict therewith," thus leaving uncertainty as to which of the rules enacted by the legislature may remain in effect. *See Richards v. Crown Point Community Sch. Corp.*, 269 N.E.2d 5 (Ind. 1971). This uncertainty was cleared up in 1984 when the legislature adopted and incorporated the Indiana Rules of Trial Procedure into the Indiana Code. IND. CODE § 34-5-1-6 (1993).

of the court of appeals as an intermediate appellate court. Indiana Appellate Rule 11(B)(3) provided:

The decision of the Court of Appeals shall be final except where a petition for transfer was granted by the Supreme Court. If transfer be granted, the judgment and decision of the Court of Appeals shall thereupon be vacated and held for naught, and the Supreme Court shall have jurisdiction of the appeal as if originally filed therein. . . .¹⁰⁴

In addition, Appellate Rule 11(B)(2) expanded the grounds for transfer to the Indiana Supreme Court.¹⁰⁵

At one point, the legislature removed a class of cases from the jurisdiction of the appellate court. In 1985, the legislature created the Indiana Tax Court with exclusive jurisdiction over any case which arises under the tax laws of Indiana and that is an initial appeal of a final determination made by: 1) the department of state revenue; or 2) the state board of tax commissioners.¹⁰⁶ The new court handled all tax appeals after July 1, 1986.¹⁰⁷

Meanwhile, the criminal docket was expanding. According to Chief Justice Shepard, two factors fueled the growth.¹⁰⁸ First, was the increased use of the new habitual offender statute by prosecutors. Second, was the result of a 1976 revision to the Indiana Criminal Code. Mandatory sentences were attached to certain kinds of cases, adding considerable time to sentences that used to be less than ten years.¹⁰⁹ Because the supreme court was overburdened with mandatory criminal appeals, the only civil cases the supreme court could hear involved either issues of first impression or contradictory rulings by the court of appeals in each of its four different districts. Thus, the burgeoning criminal docket crowded out important civil matters that needed to be clarified or modified and inadvertently turned the court of appeals into a court of last resort on civil matters.¹¹⁰ The

104. IND. APP. R. 11(B)(3) (as amended 1971) (amended 1994).

105. The rules provided that a petition for transfer must be based upon one of the following errors: 1) the decision of the court of appeals contravenes a ruling precedent of the supreme court; 2) the decision of the court of appeals erroneously decides a new question of law; 3) there is a conflict in the decision with another decision of another district of the court of appeals; 4) the decision of the court of appeals correctly followed ruling precedent of the supreme court, but such ruling precedent is erroneous or is in need of clarification or modification; or 5) the decision of the court of appeals fails to give a statement in writing of each substantial question arising on the record and argued by the parties. IND. APP. R. 11(B)(2) (as amended 1971) (amended 1990).

106. Act of Apr. 18, 1985, No. 291, §§ 1-2, 1985 Ind. Acts 2270, 2270-90 (codified as amended at IND. CODE §§ 33-3-5-1 to -20 (1993)).

107. *Id.* § 20 at 2290 (expired 1971).

108. Randall T. Shepard, *Changing the Constitutional Jurisdiction of the Indiana Supreme Court: Letting a Court of Last Resort Act Like One*, 63 IND. L.J. 669, 681-83 (1988); David J. Remondini, *Big Caseload May Greet New Appellate Judge*, INDIANAPOLIS STAR, Sept. 25, 1988, at B17.

109. Remondini, *supra* note 108, at B1.

110. Patton, *supra* note 26, at 1124.

historic problem that Indiana faced with its appellate system resurfaced: the supreme court was not able to function as a court of last resort on all matters as provided by the state constitution.¹¹¹

By 1988, criminal appeals comprised approximately ninety-three percent of the caseload of the supreme court.¹¹² This intolerable imbalance of appellate review rallied Indiana judges and lawyers behind Proposition Two, a proposed constitutional amendment which was aimed at reducing the growing workload of the state supreme court and increasing the workload of the court of appeals. Proposition Two provided that only sentences of fifty years or more would go directly to the supreme court, instead of the prior ten year or more sentence requirement. This change meant that three hundred criminal cases would be transferred to the court of appeals.¹¹³ As Chief Justice Randall T. Shepard explained:

The amendment would allow the Supreme Court to hear more oral arguments, deliberate more thoroughly, and write more reasoned opinions on legal questions of statewide importance. It will give the Supreme Court time for creativity, for lawmaking, for rethinking and readjusting the common law. That is the proper function of a state's court of last resort.¹¹⁴

The state's electorate voted in favor of Proposition Two, and the jurisdictional landscape of Indiana's appellate courts changed—a gigantic shift in the review of criminal appeals. Now, under the amended section of the constitution, only criminal cases with sentences of fifty years or more for a single offense would go directly to the supreme court.¹¹⁵ The court of appeals handles the rest. For the court of appeals this meant a dramatic increase in the number of appeals to be reviewed. As a result, the legislature added three judges to the court of appeals, and each one started with a backlog of about forty-four cases, the same as the other twelve judges.¹¹⁶ Subsequently, the court of appeals' docket exploded. In 1988, prior to the constitutional amendment, the court of appeals handed down 1121 majority opinions.¹¹⁷ In 1995, just seven years later, that number skyrocketed to 1825, with 837 of those being decisions in criminal appeals.¹¹⁸

III. JUDGES OF THE COURT OF APPEALS

At the present time (1996) the Court of Appeals of Indiana consists of fifteen

111. *Id.*

112. Averitt, *supra* note 6, at B1.

113. *Id.*

114. *Id.*

115. IND. CONST. art. VII, § 4; IND. APP. R. 4(A)(7).

116. David J. Remondini, *3 New Judges Fail To Make Dent In Appeals Backlog*, INDIANAPOLIS STAR, Jan. 22, 1991, at D1.

117. COURT OF APPEALS OF INDIANA, 1988 ANNUAL REPORT 1 (1989).

118. COURT OF APPEALS OF INDIANA, 1995 ANNUAL REPORT 1 (1996).

judges.¹¹⁹ All of the judges' offices are located in Indianapolis, Indiana. Nine of the judges are located in the State House, and the remaining six are located across the street on the twelfth floor of the National City Center. When the fourth and fifth districts were added to the court, sufficient space at the State House no longer existed, so the fourth and fifth districts were relocated across the street. Although there have been plans prepared for a new judicial building, the legislature has not appropriated funds to build it. For the present, a judicial building has been placed on the back burner. A more adequate housing arrangement for the Court of Appeals of Indiana is yet to be achieved.

During the first century of the court's existence, the number of judges on the court expanded from five to fifteen. In 1891, the act creating the appellate court allowed for only five judges, one from each of the five districts previously carved out for the supreme court.¹²⁰ In 1901, when the appellate court became a permanent court, the legislature added an additional judge and created two divisions, each with three judges.¹²¹ The number of judges remained at six for over fifty years. In 1959, when the docket of the appellate court became congested, the legislature decided to increase the number of judges to eight.¹²² The legislature was forced to increase the number of judges to nine when the 1970 constitutional amendment required that each of the three geographic districts consist of three judges.¹²³

In 1978, the nagging problem of a huge backlog of cases resurfaced. The population of Indiana had increased substantially, and with it the number of legal disputes to be resolved by the court expanded. The nine-member court of appeals could not keep up with the influx of new cases. The result was a waiting period of one and a half to two years for an appeal to be completed.¹²⁴ A survey of the court revealed that although nearly 800 cases a year were being disposed of, there remained a backlog of 800 additional cases.¹²⁵ Recognizing the familiar congestion, the legislature added three judges to the court in 1978.¹²⁶ As a result, twelve judges sat on the court of appeals.

The 1988 constitutional amendment to the judiciary article brought yet another dramatic caseload increase to the court of appeals.¹²⁷ The amendment increased the number of criminal appeals in that court because only cases involving a sentence of more than fifty years for a single offense would be appealed directly

119. IND. CODE § 33-21-2-2(a) (1993). For a chronological listing of the judges of the Indiana Court of Appeals and the Indiana Appellate Court, see Appendix.

120. Act of Feb. 28, 1891, ch. 37, § 1, 1891 Ind. Acts 39, 39 (repealed 1971).

121. Act of Mar. 12, 1901, ch. 247, § 2, 1901 Ind. Acts 565, 565 (repealed 1971).

122. Act of Mar. 12, 1959, ch. 238, § 1, 1959 Ind. Acts 567, 568 (repealed 1971).

123. IND. CONST. art. VII, § 5; IND. CODE §§ 33-2.1-2-1 to -7 (1993).

124. *House Committee Oks Adding 3-Judge Court*, INDIANAPOLIS NEWS, Feb. 15, 1978, at 4.

125. *Id.*

126. Act of Mar. 2, 1978, No. 137, § 1, 1978 Ind. Acts 1287, 1287-88 (codified as amended at IND. CODE § 33-2.1-2-2 (1993)).

127. See discussion *supra* Part II.

to the supreme court.¹²⁸ Before the amendment, criminal appeals having sentences of more than ten years were directly appealed to the supreme court. This change meant a transfer from the supreme court to the court of appeals of approximately three hundred criminal cases.¹²⁹ A short time later in 1991, three additional court of appeals judges were added which brought the total number of judges to its present strength of fifteen judges.¹³⁰

A. Selection of Judges

To be eligible to serve on the Indiana Court of Appeals, a person must have been admitted to the practice of law in Indiana for a minimum of ten years or have served as an Indiana trial court judge for at least five years.¹³¹ In addition, he or she must be domiciled within the appropriate state geographic district and a citizen of the United States.¹³²

The process used today for the selection of judges is set forth in the 1970 amendment to the Indiana Constitution. New judgeships and vacancies are filled by the governor from a list of three nominees submitted by a seven-member, non-partisan judicial nominating commission.¹³³ Those judges appointed serve a minimum of two years before they are subject to a yes-or-no retention vote at the next general election. Only the electorate of the geographic district which the judge serves votes on the question of approval or rejection.¹³⁴ Thus, the fourth and fifth district judges who stand for retention must be voted upon by the electorate of the entire geographic limits of the state. This points up an anomaly in the district representation concept, because the judges in districts one, two and three are voted on only in the geographic limits of their district; yet, these nine judges decide appeals from all over the state as do the judges in the fourth and fifth districts who must stand for statewide retention.¹³⁵

Those retained in office serve for ten years and may then run for retention for additional ten-year terms.¹³⁶ By statute, all judges must retire at age seventy-five.¹³⁷ Once a person is appointed to the court, the constitution mandates that person may not engage in the practice of law during his or her term of office.¹³⁸ In addition, a judge cannot run for an elective office, directly or indirectly make

128. IND. CONST. art VII, § 4; IND. APP. R. 4(A)(7).

129. Remondini, *supra* note 108, at B1.

130. Act of Mar. 13, 1990, No. 158, § 1, 1990 Ind. Acts 2156, 2156-57 (codified at IND. CODE § 33-2.1-2-2 (1993)).

131. IND. CONST. art. VII, § 10.

132. *Id.*

133. *Id.* See *id.* § 9 and IND. CODE §§ 33-2.1-4-1 to -17 (1993) for requirements and duties of the judicial nominating commission.

134. IND. CONST. art VII, § 11.

135. See discussion *infra* Part IV regarding geographic districts.

136. IND. CONST. art. VII, § 11.

137. IND. CODE § 33-2.1-5-1 (1993).

138. IND. CONST. art. VII, § 11.

any contribution to, or hold any office in, a political party or organization, or take part in any political campaign.¹³⁹

The process for selecting judges has changed dramatically over the years. In 1891, the governor appointed the first five judges of the court.¹⁴⁰ Only three of the five judges could be selected from the same political party.¹⁴¹ Those judges served until they could stand for election.¹⁴² If a vacancy occurred for any cause, the governor had the power to appoint a person to fill the vacancy until the next general election.¹⁴³ One of the most important mainstays was the requirement that "the Judges shall be elected from each district, and reside therein."¹⁴⁴ This requirement remains with us today, although a bit modified.

In order to be eligible to be appointed to the court today, a person must be domiciled within one of the three geographic districts.¹⁴⁵ The judges of the first, second and third districts must have resided in their respective districts before appointment to the court.¹⁴⁶ However, the legislature abolished the requirement that judges must continue to reside in that district.¹⁴⁷ As for the fourth and fifth districts, each judge of the three judge panel must have resided in a different one of the three geographic districts before appointment to the court.¹⁴⁸ As a result, the fourth and fifth districts consist of one judge who resided in the first district, one who resided in the second district, and one who resided in the third district.

Before the 1970 constitutional amendments, the appellate court judges had to be elected. Each judge was nominated at a party convention and chosen by statewide, party-label voting.¹⁴⁹ The idea of partisan election of judges had taken hold when the Jacksonian and Populist movements reached their heights.¹⁵⁰ Initiated primarily as an attack on aristocratic control of the government, this philosophy gradually led to the advocacy of universal election of all public officials, including judges. This concept captured people's imagination and led to sweeping changes in state governments across the nation. Indiana was typical of the states affected by this movement. Many of the delegates to the

139. *Id.*

140. Act of Feb. 28, 1891, ch. 37, § 2, 1891 Ind. Acts 39, 40 (superseded).

141. *Id.* § 2.

142. *Id.* §§ 2-3.

143. *Id.* § 2.

144. IND. CONST. art. VII, § 3 (as adopted 1851) (amended 1970).

145. IND. CONST. art. VII, § 10.

146. IND. CODE § 33-2.1-2-3(a) (1993).

147. *See* IND. CODE § 33-2.1-2-3 (1993).

148. IND. CODE § 33-2.1-2-3(b) (1993).

149. Paul M. Doherty, *Judicial Measure Fails in 'Quick' Senate Vote*, INDIANAPOLIS STAR, Mar. 5, 1969, at 6.

150. REPORT OF THE JUDICIAL STUDY COMMISSION 106 (report is not dated) (commission members include Dr. Herman B. Wells, Sen. F. Wesley Bowers, Rep. Robert V. Bridwell, Rep. Robert D. Anderson, Rep. John W. Donaldson, C. Ben Dutton, Sen. William W. Erwin, William M. Evans, Carl M. Gray, Sen. A. Morris Hall, Gilmore S. Haynie, Rep. David F. Metzger, and Sen. Leonard Opperman) [hereinafter COMMISSION REPORT].

Constitutional Convention of 1851 were Jacksonians and Populists, and it was primarily through their efforts that partisan election of judges was brought to Indiana.¹⁵¹

In 1967, a huge movement began to remove judges from the political arena.¹⁵² The Judicial Study Commission surveyed Indiana attorneys and found that sixty-six percent of those responding would be unwilling to run for judicial office under the election system.¹⁵³ In addition, both judges and attorneys considered court decisions to be affected by political influences.¹⁵⁴ In its report, the Commission detailed the difficulties confronting the political election of judges. It was unrealistic for a candidate to run for judicial office unless the candidate was a member of one of the major political parties. Candidates had to acquire support of the influential politicians. If candidates garnered enough support, they would run expensive political campaigns which required that each candidate supply the necessary capital or solicit it from others.¹⁵⁵ Because the appellate court nomination had to be secured in the state convention, candidates had to actively solicit the support of convention delegates. Candidates who secured the party's nomination had to campaign against opponents for several months prior to the election. Campaigning took the candidates away from their normal work, because they had to attend party dinners and party rallies, give speeches, declare their positions on issues, and further solicit votes for election. If the candidate was a judge seeking re-election, then this was done at the expense of the taxpayers because the courtroom sat idle. Candidates who were practicing attorneys could rarely afford to leave their offices; if they did so, they were forced to neglect their clients' interests.¹⁵⁶

Supporters of nonpartisan selection argued that the measure would take politics out of the selection of members of the state's highest courts and would lead to better judges.¹⁵⁷ Representative Helen E. Achor believed the measure would "improve the quality of justice in Indiana."¹⁵⁸ On the other hand, opponents argued that the measure took away from the people their right to pick judges.¹⁵⁹ Representative R. Slenker blasted the bill, declaring, "We are about to give one of our main liberties away."¹⁶⁰ He described the measure as a "monstrosity."¹⁶¹

Mindful of the philosophy that Indiana's judges should be kept close to the

151. *Id.*

152. *Bill Would Reform Courts, Take Judges From Politics*, INDIANAPOLIS STAR, Jan. 13, 1967, at 6.

153. COMMISSION REPORT, *supra* note 150, at 105.

154. *Id.*

155. *Id.* at 112-14.

156. *Id.*

157. *Hot Floor Fight Expected on Judge Selection Issue*, INDIANAPOLIS STAR, Jan. 24, 1969, at 12.

158. *Judicial Reform Approved By House*, INDIANAPOLIS NEWS, Jan. 25, 1969, at 3.

159. *Hot Floor Fight Expected on Judge Selection Issue*, *supra* note 157, at 12.

160. *Judicial Reform Approved By House*, *supra* note 158, at 3.

161. *Id.*

people, the Judicial Study Commission could not disregard the comments of Indiana's attorneys and judges who, although firmly dedicated to a free and just government, severely questioned the propriety of electing judges. The Commission proposed that the legislature create a nominating commission which would recommend three candidates to the governor. In turn, the governor would be obligated to appoint a judge from the three names submitted by the nominating commission.¹⁶²

After much debate and four years of drafting, the legislature passed a resolution calling for a constitutional amendment which provided for the nonpartisan selection of judges as outlined above.¹⁶³ On November 3, 1970, the people of Indiana ratified the new judicial article for the state's constitution and adopted today's merit system for the selection and tenure of its appellate judges.¹⁶⁴

Ten years later in 1979, the old controversy resurfaced when the Indiana House of Representatives apparently felt that judges of the state's highest courts should run for their offices the same way legislators do.¹⁶⁵ The lawmakers, many of them miffed by decisions of the supreme court and court of appeals, blocked an attempt which would keep all judges out of the political arena.¹⁶⁶ Several members criticized what they thought was an encroachment by the two courts on the authority of the legislature.¹⁶⁷ Representative Craig Campbell told the House, "If these judges are going to determine public policy, they should be answerable to the people."¹⁶⁸ The Indiana Court of Appeals Chief Judge Paul H. Buchanan, Jr. responded by stating that the merit system had created a "trained, professional judiciary."¹⁶⁹ The chief judge noted that the record of the court of appeals was improving because of the merit judicial selection process and that a return to the former elective procedure would be a mistake.¹⁷⁰ The former partisan system required judges to take time away from legal work to run their political campaigns. Chief Judge Buchanan "added that highly qualified lawyers often shied away from seeking judgeships under the elective system because of political trends unrelated to the judiciary."¹⁷¹

Despite the efforts of opponents, the merit system withstood their challenges

162. COMMISSION REPORT, *supra* note 150, at 108.

163. *Judicial Reform Approved By House*, *supra* note 158.

164. James E. Farmer, *Indiana Modernizes Its Courts*, 54 JUDICATURE 327, 327. The approval of the electorate was substantial. The referendum question prevailed by 141,323 votes. Giving approval were 527,978 voters or 57.7% of those balloting on the question, and voting against were 386,655 or 42.3%. *Id.*

165. *Back To Elected Judges?*, INDIANAPOLIS NEWS, Feb. 22, 1979, at 10.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Chief Judge Of Appeals Court Heaps Praise On Merit System*, INDIANAPOLIS STAR, Feb. 23, 1979, at 6.

170. *Id.*

171. *Id.*

and remains the selection process for today's court of appeals judges.¹⁷² The court of appeals judges are now appointed by the governor from a list of three nominees submitted by the judicial nominating commission. The court of appeals judges face retention elections two years after their appointment and thereafter every ten years.

B. Chief Judge and Presiding Judges

The Indiana Court of Appeals judges elect a chief judge, who retains that office for three years.¹⁷³ This process dates back to the beginning of the appellate court in 1891. The act creating the appellate court required that at the term of court, the judges were to meet and choose a chief judge, "who shall preside at the consultation of such Judges and in Court, but no Judge shall be chosen to preside at two terms consecutively, nor until the other Judges have each presided one term."¹⁷⁴ Today's requirements are distinguishable in two ways: 1) the elected chief judge serves a term of three years rather than a term of court, and 2) not every judge is required to serve as chief judge. In addition, each district, other than the district from which the chief judge is chosen, has a presiding judge who is elected from the three-judge district panel.¹⁷⁵ The presiding judge usually serves for the same period of time as the chief judge or until the judge resigns and is replaced by another judge within that district. The chief judge and the presiding judges perform administrative duties for the court.

C. Assignment of Appeals to the Judges

Each appeal is assigned to rotating panels of three judges, a process which began in 1987. Each panel has statewide jurisdiction. Chief Justice Shepard commented on this assignment process in his 1988 State of the Judiciary address:

[T]he Court [of Appeals] demonstrated its commitment to innovation by adopting a rotation system under which one judge from another district sits on each panel deciding a case. This system affirms the district method of organization while promoting uniformity of decision-making and greater collegiality among the members of the Court. It is an excellent example of progressive action by Indiana judges.¹⁷⁶

Once an appeal is assigned to a panel of three judges, the writing judge prepares

172. Similar unsuccessful efforts occurred in 1983, 1985 and 1989. See Richard D. Walton, *Bill Places Judges Back On Ballot*, INDIANAPOLIS STAR, Feb. 11, 1983, at 19; Rich Schneider, *Senate Panel Barely Oks Judicial Elections Proposal*, INDIANAPOLIS NEWS, Feb. 1, 1985, at 27; and Peter L. Blum, *Panel Strikes Down Change in Judicial Retention*, INDIANAPOLIS NEWS, Feb. 1, 1989, at A12.

173. IND. CODE § 33-2.1-2-4(a) (1993).

174. Act of Feb. 28, 1891, ch. 37, § 18, 1891 Ind. Acts 39, 43 (superseded).

175. IND. CODE § 33-2.1-2-4(b) (1993).

176. Chief Justice Randall T. Shepard, State of the Judiciary Address to the Indiana General Assembly (Jan. 11, 1988) (transcript on file with Indiana Supreme Court).

a draft opinion which is circulated to the other two judges on the panel. After discussion and debate, each of the two judges who received a copy of the rough draft opinion decides whether to concur, concur in result or dissent. Should both judges decide to dissent, the case is transferred from the original writing judge to the first dissenting judge for the majority opinion.

Very few oral arguments are heard by the court of appeals. If an oral argument is requested by one of the parties, the court will order oral argument in those cases it deems proper.¹⁷⁷ In 1995, the court of appeals decided 1825 cases and heard only 115 oral arguments.¹⁷⁸

IV. ORGANIZING THE COURT INTO DISTRICTS

The 1891 appellate court consisted of five judges, one from each of the five districts previously carved out for the supreme court.¹⁷⁹ This soon changed. In 1901, the court became a permanent court with six judges, and the legislature required that the judges sit in two districts—the southern half of the state constituted the first district and the northern half constituted the second district.¹⁸⁰ In 1959, when the number of judges grew to eight, four judges sat in each of the two districts.¹⁸¹

The judges continued to sit in two districts until the 1970 amendments to the judiciary article of the Indiana Constitution substantially altered the structure of the appellate court. The previous two districts were abolished, and three new districts were created. Each district consisted of three judges.¹⁸² These three geographic districts divided Indiana into three approximately equal population segments.¹⁸³ The court was served by nine judges—three from each of the three geographic districts.¹⁸⁴ Later, when the fourth and fifth districts were added, the segmented geographic population formula was abandoned in favor of a statewide concept.¹⁸⁵

On August 17, 1977, a judicial study commission held a public hearing to determine if the court of appeals should be enlarged. During the hearing, several of the speakers discussed their views on the proposal of a fourth geographic district based upon population. Jeanne Miller, chairperson for the Indiana Bar Association Committee on Improvements in the Judicial System, proposed a

177. IND. APP. R. 10. The court may also order oral argument on its own motion. *Id.*

178. COURT OF APPEALS OF INDIANA, 1995 ANNUAL REPORT 1 (1996).

179. *See* IND. CONST. art. VII, § 1 (as adopted 1851) (amended 1970); *id.* § 4 (as adopted 1851) (amended 1988).

180. Act of Mar. 12, 1901, ch. 247, § 2, 1901 Ind. Acts 565, 565 (repealed 1971); *id.* § 3 (repealed 1971).

181. Act of Mar. 12, 1959, ch. 238, § 1, 1959 Ind. Acts 567, 568 (repealed 1973).

182. IND. CONST. art. VII, § 5 (amended 1970).

183. Act of Apr. 14, 1971, No. 427, § 3, 1971 Ind. Acts 1979, 1981-82 (codified as amended at IND. CODE §§ 33-2.1-2-1 to -7 (1993)).

184. *Id.* at 1981.

185. IND. CODE § 33-2.1-2-2(4) and (5) (1993).

geographic district at-large.¹⁸⁶ She argued that the constitution requires geographic districts, but it does not state the size of those districts. She suggested that a reasonable interpretation would allow some of the districts to overlap with one another.¹⁸⁷ What was not considered was the gross inequity that would be worked by the retention process. Some of the judges would be retained by a small number of voters in their district while others would have to stand for retention on a statewide vote.

In 1978, the legislature created a fourth district. In so doing, the general assembly refused to redistrict the entire state into four geographic districts. It abandoned the procedure it had used before when it created the three original districts and instead created an at-large district. The new fourth district encompassed the entire state and its population. The judges who filled the new fourth district each came from a different one of the three originally established geographic districts. In 1991, the legislature followed the same procedure when the fifth district was created as an at-large district.¹⁸⁸

This scheme results in some rather harsh political consequences for the judges of the fourth and fifth districts when they stand for retention. The Indiana Constitution provides that the judges are subject to a retention vote by the electorate of the geographic district he or she serves.¹⁸⁹ Therefore, the judges of the fourth and fifth districts are subject to statewide election, while the judges of the other three districts are subject to a retention vote only by the electorate of their particular district which consists of only a few counties. Instead of being retained from a specific geographic district of, perhaps, nineteen counties, the fourth and fifth district judges must be retained in office by holding themselves out to the voters of all ninety-two counties of the state.

The concept of geographic districts also plays an important role in how the court decides cases. All appeals are placed upon the docket of one of the original three geographic districts from which the appeal may have been taken.¹⁹⁰ The jurisdiction of the court is conferred by subject matter and not according to particular geographic districts or a particular judge.¹⁹¹ So, if there is an undue disparity in the number of cases pending on the dockets of any district, the court of appeals may reduce the disparity by transferring cases to other districts.¹⁹² The Indiana Supreme Court discussed the procedure of transferring cases between districts in *State ex rel. Shortridge v. Court of Appeals*.¹⁹³ In *Shortridge*, the appellant argued that the appellate court "exceeded its jurisdiction by transferring

186. JUDICIAL STUDY COMMISSION OF INDIANA, IN THE MATTER OF: THE PROPOSED FOURTH DISTRICT FOR THE COURT OF APPEALS 35-36 (1977).

187. *Id.*

188. IND. CODE § 33-2.1-2-2 (1993).

189. IND. CONST. art VII, § 11.

190. IND. CODE 33-2.1-2-2(d) (1993).

191. See *State ex rel. Shortridge v. Court of Appeals of Indiana*, 468 N.E.2d 214, 216 (Ind. 1984).

192. IND. CODE § 33-2.1-2-2(d) (1993).

193. *Shortridge*, 468 N.E.2d 214.

the cases from the statutorily-designated districts without orders or order book entries reflecting: the transfer of the cases and reasons for the transfers; the disqualification or inability to sit the judges in the districts to which the cases were originally assigned; and the designation of the judges who ultimately comprised the respective panels.”¹⁹⁴ The supreme court held that “jurisdiction of the Court of Appeals lies with the court as a whole, not with the statutorily-designated districts or the judges thereof.”¹⁹⁵ The court reasoned that neither the Indiana Constitution nor the general assembly provided for separate and independent courts. The supreme court refused to compel the court of appeals to make entries reflecting each internal action taken in the administration of its caseload. Consequently, the court of appeals continues to transfer cases between districts. The district transfer process and the statewide at-large districts allow the court of appeals administration to divide the docket more evenly among the five districts, thereby promoting a more efficient judicial system.

V. PUBLICATION OF WRITTEN OPINIONS

To publish or not to publish every opinion is still a question for many state courts today. In Indiana, our courts and our legislature have struggled with that same question for years. Back in 1851, the state constitution required the Indiana Supreme Court to answer in writing every question raised by the parties in their appeal.¹⁹⁶ A court reporter’s office was established by the general assembly to publish those decisions.¹⁹⁷ However, in 1891, when the legislature created the appellate court, written opinions were only necessary when the appellate court reversed a lower court’s decision.¹⁹⁸ In 1901, when the appellate court became a permanent court, the legislature retained that provision continuing the requirement that a written opinion need only be issued when a case was reversed.¹⁹⁹

In *Craig v. Bennett*, the Indiana Supreme Court reiterated the “only when reversed” principle by stating that the 1901 statute “makes it the duty of the

194. *Id.* at 215-16.

195. *Id.* at 216.

196. “The Supreme Court shall, upon the decision of every case, give a statement in writing of each question arising in the record of such case, and the decision of the Court thereon.” IND. CONST. art. VII, § 5 (as adopted 1851) (amended 1970).

197. *Id.* § 6 (as adopted 1851) (amended 1970).

198. The act stated:

In every case reversed, an opinion shall be given upon the material questions therein in writing, stating the reasons, and judgment shall be entered with directions therein to the lower Court, as required of the Supreme Court in such cases, and the opinion and judgment shall be certified to the Court below.

Act of Feb. 28, 1891, ch. 37, § 13, 1891 Ind. Acts 39, 42 (superseded).

199. Act of Mar. 12, 1901, ch. 247, § 17, 1901 Ind. Acts 565, 570 (codified as amended at IND. CODE § 33-3-2-15 (1993)). The pertinent section of the act reads: “In every case reversed by a division of the Appellate Court, an opinion shall be given on the material questions therein in writing, and the appropriate judgment shall be entered with directions to the lower court.” *Id.*

appellate court to give and file a written opinion on each material question involved and duly presented in the appeal, only when the judgment of the trial court is reversed."²⁰⁰ The supreme court elaborated:

If the judgment is affirmed, the court is not, under the law, required to give a written opinion disclosing the reasons for the judgment of affirmance. It may, however, in the exercise of its discretion, if it deems the questions presented of sufficient importance, do so; but in regard to that question the legislature has left the court alone to determine.²⁰¹

In addition, the supreme court concluded that the appellate court was not controlled by the 1851 constitutional provision which required the supreme court to give a statement in writing of each question arising in the record.²⁰²

But thirty years later, the Indiana Supreme Court changed its mind and expressly overruled *Craig v. Bennett*.²⁰³ In *Hunter*, the supreme court stated that the *Craig* court failed to take notice of a section in the 1901 act which required: "Appeals to the Appellate Court shall be taken in the same manner and with the same effect and subject to the same limitations and restrictions as are now or hereafter may be provided in cases of appeals to the Supreme Court."²⁰⁴ The supreme court in effect held that article VII, section 5 of the 1851 Indiana Constitution applied to the appellate court. Section 5 required that the supreme court "give a statement in writing of each question arising in the record of such case, and the decision of the Court thereon."²⁰⁵ Additionally, the court held that the statute which allowed the appellate court to give a written opinion only in cases reversed did not relieve the appellate court of the duty imposed by the constitution regarding all cases, which included cases affirmed.²⁰⁶ The court further held that it would be the duty of the appellate court to comply with the law as stated in *Hunter*.²⁰⁷

Prior to the supreme court's decision in *Hunter*, the appellate court affirmed the judgments of lower courts in approximately sixty cases each year. None of the sixty cases were decided by a written opinion or statement in writing of the material questions arising in the record.²⁰⁸ After the *Hunter* opinion, Noel C. Neal, Chief Judge of the Indiana Appellate Court stated, "It is obvious that the disposition of 60 cases without a written opinion or statement in writing was

200. *Craig v. Bennett*, 62 N.E. 273, 274 (Ind. 1901).

201. *Id.*

202. *Id.* Interestingly, the supreme court had felt the oppressiveness of the 1851 constitutional provision and narrowed its scope in *Willets v. Ridgeway*, 9 Ind. 367 (1857).

203. *Hunter v. Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.*, 174 N.E. 287, 289 (Ind. 1930).

204. Act of Mar. 12, 1901, ch. 247, § 15, 1901 Ind. Acts 565, 569 (repealed 1971).

205. IND. CONST. art. VII, § 5 (as adopted 1851) (amended 1970).

206. *Hunter*, 174 N.E. at 289.

207. *Id.*

208. Noel C. Neal, Address at the 35th Annual Meeting of the State Bar Association (Jul. 9-10, 1931), in 7 IND. L.J. 40, 40-43 (1931).

equivalent to the work of one judge for an entire year.”²⁰⁹ Chief Judge Neal’s cry for help went unheeded. The “lost judge” was to remain so for the next forty years.

Written opinions for each question presented continued until the 1970 constitutional amendments were drafted. The section requiring a statement in writing of each question arising in the record was deleted, but not overlooked by the legislature. Later in 1972, the legislators passed a statute which stated: “The judicial opinion or decision in each case determined by the supreme court or the court of appeals shall be reduced to writing.”²¹⁰ Now, each opinion or decision had to be in writing. No longer did the courts have to give a statement in writing of each question. In fact, the Indiana Supreme Court later commented on the change and determined: “The Supreme Court and the Court of Appeals are thus required to issue written decisions, as opposed to oral ones, but are not constitutionally *required* to give a written statement of reasons for every action taken by the court.”²¹¹

This was taken one step further in 1976, when the supreme court revamped the Indiana Rules of Appellate Procedure.²¹² The 1976 rule, which is the current rule, allows the court of appeals to issue written memorandum decisions which will not be published or apply to any other case than the one appealed.²¹³ The rule requires a written published opinion if the case: 1) establishes, alters, modifies or clarifies a rule of law; 2) criticizes existing law; or 3) involves a legal or factual issue of unique interest or substantial public importance.²¹⁴ In contrast, a memorandum decision is to be used in routine cases where precedent has been set. However, a dissent from a memorandum decision may be expressed by a published opinion.²¹⁵

Whether a party may cite an unpublished decision as authority varies from jurisdiction to jurisdiction. In Indiana, memorandum decisions cannot be regarded as precedent nor cited before any court except for the purpose of establishing the defense of *res judicata*, collateral estoppel or the law of the case.²¹⁶ There is a huge debate going on across the country as to whether all opinions, published officially or not, should be citable in a court. There are many reasons why

209. *Id.* at 41.

210. IND. CODE § 33-2.1-3-2 (1993).

211. *Tyson v. State*, 593 N.E.2d 175, 180 n.10 (Ind. 1992) (emphasis in original).

212. Interestingly, the legislature introduced a similar measure in 1963 which failed. See *Bill Would Aid Appellate Court*, INDIANAPOLIS STAR, Feb. 11, 1963, at 17.

213. IND. APP. R. 15(A); see also Byron C. Wells, *New Rules for Judicial System Adopted*, INDIANAPOLIS STAR, Nov. 30, 1975, at 18.

214. IND. APP. R. 15(A).

215. *Id.*

216. *Id.* In Indiana, nonpublished memorandum decisions of the Indiana Court of Appeals can be accessed through a computer bulletin board system (BBS). The BBS retains memorandum decisions for sixty days. Any interested party with appropriate equipment may access the system which is available twenty-four hours a day, seven days a week. For instructions on using the BBS, contact the Clerk of the Indiana Supreme Court and the Indiana Court of Appeals.

unpublished decisions are disfavored. A primary argument is that their content is often not of acceptable quality.²¹⁷ The decisions generally do not disclose rationale or present sufficient legal analysis. In addition, there are valid concerns regarding judicial overproduction which have persisted throughout the twentieth century.

On the other hand, there is a very vocal segment of the practicing bar which contends that unpublished opinions are damaging to the legal system. There is a concern that courts are deliberately burying their work product and suppressing precedent. They believe that nonpublication is "nothing less than censorship . . . shaping common law."²¹⁸ However, the vast majority of federal and state courts place severe limitations on the use of unpublished decisions and orders as legal precedent.²¹⁹ Nevertheless, there are other members of the bar who argue that the trend may be toward more liberal rules on citing unpublished decisions and allowing greater access to all opinions of the court.²²⁰

The debate and controversy will likely continue.²²¹ For now, the rule remains in Indiana that the court of appeals may issue written but unpublished, memorandum decisions to decide routine cases where precedent has already been established.

CONCLUSION

With the electronic information revolution coming on the heels of the 1972 constitutional amendment, new administrative demands are bound to follow. Written opinions can now be read on your computer screen the same day they are handed down. Too, unpublished opinions *are* available. They may not be cited as authority, but the debate whether to cite them still persists. The electronic revolution has changed the ability of the court of appeals to absorb more cases, so the legislature may be able to look forward to a long rest before any more demands are made to expand the court. In addition, there are other pressure valves available to settle disputes in a society which is growing more complex each year. Alternative dispute resolution is one solution. Another is the senior judge program where retiring judges may still pitch in and reduce the caseload on the court of appeals and trial courts. For the immediate future, it appears that the Indiana judicial landscape is in very good condition.

217. John J. Zodrow, *Citing Unpublished Opinions: Being Resourceful or Breaking the Rules?*, FOR THE DEFENSE, Jan. 1996, at 34.

218. Peter A. Joy, *Unpublished Opinions Stunt Common Law*, NAT'L L.J., Jan. 29, 1996, at A19.

219. Zodrow, *supra* note 217, at 35.

220. *Id.* at 39.

221. For additional interesting articles on nonpublication of opinions, see John G. Kester, *Appeals Courts Keep More and More Opinions Secret*, WALL S. J., Dec. 13, 1995, at A19; David M. Gunn, "Unpublished Opinions Shall Not Be Cited as Authority": the Emerging Contours of Texas Rule of Appellate Procedure 90(i), 24 ST. MARY'S L.J. 115 (1992); Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940 (1989); and George M. Weaver, *The Precedential Value of Unpublished Judicial Opinions*, 39 MERCER L. REV. 477 (1988).

APPENDIX

CHRONOLOGICAL LISTING OF APPELLATE COURT AND COURT OF APPEALS JUDGES

James B. Black 3-12-1891-1893 1-1-1897-1907	Francis M. Thompson 1-1-1925-1929 Noel C. Neal 11-12-1928-1933 Elmer Q. Lockyear 1-1-1929-1933 Posey T. Kime 1-1-1931-1938 Alphonso C. Wood 1-1-1931-1939 William H. Bridwell 1-1-1931-1941 Harvey J. Curtis 1-1-1931-1943 Ralph N. Smith 1-1-1933-1936 William F. Dudine 1-1-1933-1941 Fred A. Wiecking 11-4-1935-1936 Paul E. Laymon 1-11-1936-1941 A. J. Stevenson 10-14-1938-1943 Huber W. DeVoss 1-1-1939-1943 Charles H. Bedwell 4-4-1941-1943 Edgar M. Blessing 1-1-1941-1945 Dan C. Flanagan 1-1-1941-1949 Paul F. Dowell 1-1-1943-1945 Floyd S. Draper 1-1-1943-1951 Wilbur A. Royse 1-1-1943-1958 Harry L. Crumpacker 1-1-1943-1958 Frank Hamilton 1-1-1945-1949 Donald E. Bowen 10-23-1945-1959 F. L. Wilttrout 1-1-1949-1953 Warren W. Martin 1-1-1949-1953 1-1-1965-1965 Harold E. Achor 1-1-1951-1955 John A. Kendall 1-1-1953-1956 Dewey E. Kelley 1-1-1953-1964 John W. Pfaff 1-1-1955-1959 1-1-1961-1964 1-1-1967-1971 James C. Cooper 1-1-1957-1964 1-1-1967-1970 G. Remy Bierly 1-1-1959-1962 1-1-1965-1969 Walter Myers, Jr. 1-1-1959-1962 John S. Gonas 1-1-1959-1962 John R. Ax 1-1-1959-1962 John M. Ryan 3-16-1959-1964	Russell W. Smith 4-16-1959-1962 1-1-1965-1969 French Clements 1-1-1963-1963 Donald R. Mote 1-1-1963-1967 Donald Hunter 1-1-1963-1967 Thomas S. Faulconer 12-23-1963-1969 Joseph O. Carson 1-1-1963-1971 George H. Prime 1-1-1965-1969 Hubert E. Wickens 8-1-1965-1967 Charles W. Cook 1-1-1967-1968 Charles S. White 12-17-1968-1978 Allen Sharp 1-1-1969-1973 Joe W. Lowdermilk 1-1-1969-1979 George B. Hoffman, Jr. 1-1-1969- Patrick D. Sullivan 1-1-1969- Robert B. Lybrook 9-17-1970-1971 1-11-1972-1979 Paul H. Buchanan, Jr. 1-1-1971-1993 Jonathan J. Robertson 1-1-1971- Robert H. Staton 1-1-1971- William I. Garrard 1-21-1974- V. Sue Shields 7-1-1978-1994 Eugene N. Chipman 8-1-1978-1981 Stanley B. Miller 8-1-1978-1994 James B. Young 8-1-1978-1988 Robert W. Neal 10-1-1979-1989 Wesley W. Ratliff Jr. 1-1-1980-1992 William G. Conover 10-26-1981-1993 Linda L. Chezern 11-21-1988- John G. Baker 6-2-1989- Betty Barteau 1-1-1991- Robert D. Rucker 1-1-1991- John T. Sharpnack 1-1-1991- Edward W. Najam, Jr. 12-30-1992- Ezra H. Friedlander 1-7-1993- Patricia A. Riley 1-1-1994- James S. Kirsch 3-4-1994- Carr L. Darden 11-28-1994-
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THE HISTORY OF THE INDIANA TRIAL COURT SYSTEM AND ATTEMPTS AT RENOVATION

JOHN G. BAKER*

INTRODUCTION

Since the formation of Indiana as a territory to the present day, advocates of reform of Indiana's trial court system have enjoyed only limited and short-lived success. Throughout Indiana's history, advocates have addressed a number of issues; however, their goal of a single tier organization of trial courts and merit selection of all judges has proved elusive. This Article evaluates the history of the Indiana General Assembly's attempts to address the call for a more organized trial court system and judge selection process in Indiana. This history shows the general assembly's ambivalence in forgoing its control over parochial issues and its recalcitrance in surrendering control over not only the various dockets of the Indiana trial courts, but over the people who administer those dockets—the state's trial judges.

As recently as 1986, the Indiana Judges Association advocated a series of reforms for the state's judicial system.¹ This proposal contained a number of changes which required legislative approval, but some required action only within the judicial branch itself. The 1986 proposal was based, in part, on the recommendations advanced by the Indiana Judges Association in 1978.² Specifically, the most recent suggestions championed were: 1) a unified, single-tier jurisdiction system of trial courts, 2) selection of all judges by a merit selection system, 3) total state funding of the court system, 4) improved judicial salaries, 5) improved court record keeping, and 6) reexamination of the change of venue and change of judge rules.³

Although attempts to address all these proposals collectively met with initial approval by an interim legislative study committee, the proposal was withdrawn prior to its arrival before the general assembly.⁴ Not to be deterred, the judges who advocated reform acted internally when they could and have enjoyed a significant degree of success. The Indiana Supreme Court addressed change of venue and change of judge requirements by taking steps to curtail a litigant's

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1. INDIANA JUDGES ASS'N, A PROPOSAL FOR REFORM OF THE INDIANA TRIAL COURT SYSTEM (1986) [hereinafter PROPOSAL].

2. INDIANA JUDGES ASS'N, THE INDIANA TRIAL COURT SYSTEM: RECOMMENDED IMPROVEMENTS (1978).

3. PROPOSAL, *supra* note 1.

4. INDIANA SENATE JOURNAL, 106th Gen. Ass'y, 1st Reg. Sess. 291 (Ind. 1989) (S. 12, 106th Gen. Ass'y withdrawn from consideration).

ability to forum shop.⁵ Coupled with the court's eventual usage of tools legislatively granted or inherently authorized by the constitution,⁶ the supreme court has begun to assume a leadership role in helping the judiciary manage its own inventory of cases. For example, as authorized by statute,⁷ the supreme court has created trial court districts to improve the allocation of judicial resources. Further, recent amendments to the Indiana Trial Rules and Indiana Appellate Rules have demonstrated that the court is willing to address management of the cases in Indiana courts by modernizing the record keeping system throughout the state⁸ and by providing rules requiring trial courts to cooperate and work together in the selection of special judges.⁹

Other than state funding of the trial courts, which is not addressed in this analysis, the only remaining issues that have gone unattended are: 1) the organization of the trial court system and 2) the selection of trial court judges.

I. NATIONAL TRENDS IN TRIAL COURT STRUCTURE

Indiana's current judicial system is comprised of three tiers: 1) various trial courts—including small claims, town, city, county, probate, superior, and circuit—all with varying jurisdictions, 2) an intermediate court of appeals and a tax court, and 3) a supreme court.¹⁰ The problems of Indiana's multi-tiered trial court system include the local financing of courts,¹¹ which results in inadequate funding for some courts. These courts must then depend upon judicial mandates in order to function. In addition, some courts suffer from overcrowded dockets, while other courts function only part-time due to their lighter caseload. The best-qualified judges do not always remain in office because an uninformed electorate

5. The supreme court has adopted the following court rules: IND. CRIM. R. 12 (limiting change of venue in criminal cases); IND. CRIM. R. 2.2 (requiring trial courts to develop plan for non-discretionary assignment of all felony and misdemeanor cases filed in the county); *see* *Tyson v. State*, 619 N.E.2d 276, 300 n.33 (Ind. Ct. App. 1993) (The current system allows prosecutors to choose which judge will hear a case in Marion County because cases are assigned sequentially to the six Marion County criminal division judges in blocks of fifty cases. Thus, it is possible for a prosecutor to find out when cases are being assigned to a certain judge and file the information accordingly.); IND. TR. R. 76 (limiting change of venue in civil cases).

6. IND. CONST. art. VII, § 1. *See also* *Heath v. Fennig*, 40 N.E.2d 329 (Ind. 1942) (recognizing court's inherent power to regulate judicial matters); *Tucker v. State*, 35 N.E.2d 270 (Ind. 1941).

7. IND. CODE § 33-2.1-7-8 (1993) (authorizing supreme court to make districts and transfer judges).

8. IND. TR. R. 77 (requiring the clerk of the circuit court to maintain a chronological case summary and a record of judgments and orders book in all cases).

9. IND. TR. R. 79.

10. *See infra*, Appendix.

11. Trial courts are primarily funded by the individual counties. DIVISION OF STATE COURT ADMIN., SUPREME COURT OF INDIANA, INDIANA JUDICIAL REPORT 89-91 (1992) (report showing allocation of revenues).

can vote to remove them. Although Indiana is afflicted with a multiplicity of courts at the trial court level, the national trend has been to unify the courts by moving to a single-tier system.¹²

The benefits to be derived from court unification are legion. They include a reduction of overlapping and fragmented jurisdiction among the trial courts, better deployment and use of judges and support staff, elimination of conflicting local court rules and establishment of uniformity of process, more expeditious trial and appellate processes, greater uniformity in procedures, and better access to records and equipment to facilitate case management and reduce costs.¹³

The national trend toward unification began with Dean Roscoe Pound who set forth four “controlling ideas” as the basis of the unified court system: unification, flexibility, conservation of judicial power, and responsibility.¹⁴ More specifically:

The characteristics of a unified court system are a single structured court divided into two or three levels or branches, one to handle the appellate business and one or two for trial work. The business and personnel affairs of the system are usually managed by a chief justice assisted by an administrative director and staff. The power to make procedural and administrative rules is vested in the supreme court. Tribunals which hear limited jurisdiction cases are a part of the whole working scheme and enjoy a dignified status.¹⁵

Adopting a unified court system would eliminate the multiplicity of courts at the trial level. Those who support the unified system contend that courts of limited jurisdiction were necessary at a time in American judicial history when laymen were forced to hear and decide cases because of the lack of people trained and educated in the law. Such laymen were limited to hearing cases involving misdemeanors or civil claims of less than a specified amount. A disgruntled party in these inferior courts appealed to the trial court of general jurisdiction, where the case was tried *de novo*.¹⁶

The trend toward unification that originated with Pound continued with the “Vanderbilt-Parker” guidelines on judicial administration. These consisted initially of recommendations by committees of the ABA Section of Judicial Administration, under the leadership of Chief Judge John J. Parker, which were adopted by the House of Delegates of the American Bar Association in 1938. These recommendations were augmented and elaborated upon by standards adopted by the Section of Judicial Administration as a result of efforts led by Chief

12. PROPOSAL, *supra* note 1, at 1.

13. *Id.*

14. Roscoe Pound, *Principles and Outline of a Modern Unified Court Organization*, 23 JUDICATURE 225 (1940).

15. R. Stanley Lowe, *Unified Courts in America: The Legacy of Roscoe Pound*, 56 JUDICATURE 316, 318 (1973).

16. Lyle H. Truax, *Courts of Limited Jurisdiction are Passé*, 53 JUDICATURE 326, 326 (1970).

Justice Arthur T. Vanderbilt of New Jersey.¹⁷

Thereafter, movement toward unification was advanced by the American Judicature Society and the American Bar Association, the latter having merged its recommendations for trial court organization and judicial selection into one proposal. The American Judicature Society played an active role in the partial adoption of merit selection in Indiana in 1970 and its retention in Lake, St. Joseph and Allen Counties as well as the municipal courts in Marion County.¹⁸ The American Bar Association advocated the following standards which were approved in 1974 and amended in 1990:

Section 1.12 Trial Court. The trial court should be organized as a single level court.

(a) Jurisdiction and procedure. The trial court should have jurisdiction of all adjudicative proceedings, except appeals and matters in which original jurisdiction is vested in an administrative board or agency. . . .

. . . .

(b) Judges and judicial officers. The trial court should have a single class of judges, selected as provided in Section 1.21. To assist the judges, the court should have a convenient number of judicial officers performing such functions as conducting preliminary and interlocutory hearings in criminal and civil cases, presiding over disputed discovery proceedings, receiving testimony as referee or master, and hearing short causes and motions, all of which are subject to judicial approval. The judicial officers should be selected as provided in Section 1.26. . . .

. . . .

Section 1.21 Selection of Judges. Persons should be selected as judges on the basis of their personal and professional qualifications for judicial office. Their concept of judicial office and views as to the role of the judiciary may be pertinent to their qualification as judges, but selection should not be made on the basis of partisan affiliation.

(b) Procedure for selecting judges. Judges should be selected through a procedure in which for each judicial vacancy as it occurs (including the creation of a new judicial office) a judicial nominating commission nominates at least three qualified candidates, of whom the governor appoints one to office.¹⁹

17. See ARTHUR T. VANDERBILT, *MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION* (1949).

18. See generally SARIS S. ESCOVITZ ET AL., *AMERICAN JUDICATURE SOC'Y, JUDICIAL SELECTION AND TENURE* (1975).

19. JUDICIAL ADMIN. DIV., A.B.A., *STANDARDS RELATING TO COURT ORGANIZATION* 18-19,

The American Bar Association's position on merit selection as advanced in Section 1.21 was initially endorsed by the American Bar Association in 1937 and became known as the "Kales, Missouri, merit or commission plan for judicial selection."²⁰ Thirty-four jurisdictions, including Indiana,²¹ have since adopted the merit selection plan for selection of some of their judges.²² The American Judicature Society has similarly promoted the adoption of the merit selection plan for judicial selection²³ and has served as a prime mover in Indiana's initial foray into usage of merit selection on a limited basis and in protecting the progress already made.²⁴

In order to assess the likelihood of a successful campaign for change, one must become familiar with the paths that trial court organization and judicial selection have traveled since Indiana became a territory. By examining some of the successes that advocates of reform have attained in the past, one may be able to foretell some of the ingredients necessary for future reforms. Logically, such a trek through the history of the Hoosier judiciary must begin with the origins and initial modifications of the trial court structure and judicial selection methods. This journey will not only chronicle the changes our legislature has made, but it will also demonstrate a reluctance on the legislature's part to relinquish its control over the forums available to litigants on the local level and the judges themselves.

II. THE STRUCTURAL TRANSFORMATION OF INDIANA'S TRIAL COURT SYSTEM

A. *Territorial Development (Pre-1816)*

Indiana, which was carved out of the vast wilderness surrendered to the United States after the Peace of Paris in 1783, finds its direct lineage from the area north and west of the Ohio River in what was to become known as the Northwest Territory. The makeup of the territorial judiciary was dictated by sections three through five of "An Ordinance for the Government of the Territory of the United States North-West of the Ohio River," which stated in pertinent part:

47 (1990).

20. JOANNE MARTIN, MERIT SELECTION COMMISSIONS: WHAT DO THEY DO? HOW EFFECTIVE ARE THEY? 3 (1993).

21. IND. CONST. art. VII, §§ 9-10. Lake, St. Joseph, and Allen Counties also use merit selection for selecting judges. IND. CODE §§ 33-5-29.5-36 (Supp. 1996) (Lake County); 33-5-40-4 (Supp. 1996) (St. Joseph County); 33-5-5.1-38.1 (1993) (Allen County).

22. See MARTIN, *supra* note 20, at 1.

23. ESCOVITZ ET AL., *supra* note 18.

24. Representatives of the American Judicature Society appeared and testified before both the House Judiciary and House Ways and Means Committees when those bodies were considering a proposal to eliminate the merit selection process in Lake and St. Joseph Counties as contained in Senate Bill 116 in the 1994 General Assembly. Although the House rejected the American Judicature Society's suggestions, the Senate refused to concur in the House's proposed amendments, and the bill expired on the last day of the General Assembly, March 4, 1994. INDIANA SENATE JOURNAL, 108th General Ass'y, 2nd Reg. Session 222, 240, 449 (Ind. 1994).

There shall also be appointed a court to consist of three judges any two of whom to form a court, who shall have a common law jurisdiction and reside in the district and have each therein a freehold estate in five hundred acres of land while in the exercise of their offices, and their commission shall continue in force during good behaviour.

The governor, and judges or a majority of them shall adopt and publish in the district such laws of the original states criminal and civil as may be necessary and best suited to the circumstances of the district and report them to Congress from time to time, which laws shall be in force in the district until the organization of the general assembly therein, unless disapproved of by Congress; but afterwards the legislature shall have authority to alter them as they shall think fit.²⁵

Thus, the original judiciary of the territory which later became the State of Indiana possessed both judicial and legislative responsibilities. The Northwest Ordinance provided for various stages of territorial government. During the first stage, Governor St. Clair created several large counties and located seats of government close to the centers of population for "the prevention of crimes and the administration of justice."²⁶ At that time, the governor, a secretary, and the three judges comprised the governmental structure of the Northwest Territory.²⁷

The legislative responsibilities entrusted to the governor and members of the judiciary were limited in that the governor and judges were required to select laws only from those which had been approved by the original states and that selection was subject to the disapproval of the federal Congress. Feeling "severely restricted by this requirement, St. Clair and the judges— Samuel Parsons, James Varnum, and John Symmes—agreed among themselves to modify the laws of other states and add new laws to fit the frontier conditions, so long as the laws remained true to the Constitution and republican principles."²⁸ These new laws of the Northwest Territory "blended English common law, colonial practice, Puritan punishments . . . and frontier expediency."²⁹ One of the first new laws enacted set up a territorial court system and enumerated a list of crimes and punishments.³⁰

The first courts of the Northwest Territory were created by an act of the original Congress on August 23, 1788, before the adoption of the Federal Constitution in 1789.³¹ The highest trial court in the territory was the general or territorial court.³² This court, which could be held by all members sitting together

25. THE NORTHWEST ORDINANCE, 1787, A BICENTENNIAL HANDBOOK 36 (Robert M. Taylor, Jr. ed., 1987) [hereinafter HANDBOOK].

26. *Id.*

27. *Id.*

28. *Id.* at 38.

29. *Id.*

30. *Id.*

31. 1 LEANDER J. MONKS, COURTS AND LAWYERS OF INDIANA 4-5 (1916).

32. 1 *id.* at 5; see THE LAWS OF THE NORTHWEST TERRITORY, 1788-1800, at 11 (Theodore

or by one alone,³³ met annually at Marietta (Ohio), Cincinnati, Detroit, Vincennes (Indiana), and Kaskaskia (Illinois).³⁴

It [the General Court] was a Common Law tribunal without chancery powers. It had original as well as appellate jurisdiction in all civil and criminal cases. In capital and divorce cases, it possessed exclusive jurisdiction. . . . It could revise and reverse the decisions of all courts below it, even though one of its own justices had presided. Even the Supreme Court of the United States could not review the decisions.³⁵

Also in existence at this time were the county courts of common pleas and the general courts of quarter sessions of the peace. These courts were the highest of the local courts. The quarter sessions courts, which were of equal rank with the courts of common pleas, usually shared the same justices.³⁶ These courts had jurisdiction over petty crimes and misdemeanors, such as gambling, provocation, assault and battery, and drunkenness.

The court of common pleas was "a civil court, having jurisdiction over civil pleas between citizens of the same county."³⁷ The court met two times per year in each county where the quarter session court sat. Three common pleas justices usually sat together.³⁸ Every final decree rendered by the court was appealable to the general court of the territory.³⁹

By 1788, the governor and the three judge administration of the Northwest Territory recognized a need to control small claims; therefore, they established justice of the peace courts.⁴⁰ These justice of the peace courts were granted jurisdiction to hear and determine all cases involving debts of five dollars or less.⁴¹ The judges also set up a coroner's court in which it was the duty of the coroner to inquire about sudden deaths or deaths occurring in prison.⁴²

In 1795, after the creation of the first courts of the Northwest Territory, legislation adopted from the Pennsylvania Code re-established the court system to include a general court, a circuit court, and a court of general quarter sessions.⁴³ This general court of the territory, also known as the supreme court, met twice each year.⁴⁴ The judges of the general court had the power to issue writs of habeas corpus, certiorari, error, and other remedial writs all of which were returnable to

C. Pease ed., 1925) [hereinafter LAWS].

33. 1 MONKS, *supra* note 31, at 5.

34. 1 *id.*

35. 1 *id.* at 6-7.

36. 1 *id.* at 14; *see* LAWS, *supra* note 32, at 4-7.

37. 1 MONKS, *supra* note 31, at 14; *see also* LAWS, *supra* note 32, at 7-8.

38. 1 MONKS, *supra* note 31, at 14.

39. LAWS, *supra* note 32, at 9.

40. ROBERT G. WHITINGER, INDIANA SMALL CLAIMS 2 (1980); LAWS, *supra* note 32, at 4.

41. WHITINGER, *supra* note 40, at 2.

42. LAWS, *supra* note 32, at 24-25.

43. *Id.* at 154-60.

44. *Id.* at 156.

the general court for appeal.⁴⁵

The circuit court, which was an intermediate court between the quarter sessions courts and the supreme court, was established in St. Clair and Knox counties and met twice a year in those counties.⁴⁶ The circuit court could only be presided over by one or more of the territorial judges.⁴⁷

The courts of general quarter sessions, in which three justices usually sat together, met in Daviess, Hamilton, St. Clair, and Knox Counties.⁴⁸ All cases tried in the quarter sessions could be appealed by a common writ of error to the general court.⁴⁹

Also adopted from the Pennsylvania Code in 1795 was the orphans' court.⁵⁰ The orphans' court had jurisdiction over every person who as guardian, trustee, tutor, executor, or administrator, was entrusted or accountable for any land, tenements, goods, chattels or estates belonging to any orphan or person under age.⁵¹ Originally, the business of the orphans' court was transacted by the probate judge.⁵² However, the law creating the orphans' court directed the justices of the court of quarter sessions to transact the business of the orphans' court during the same week as the court of quarter sessions and at the same place.⁵³ All cases tried in the orphans' court could be appealed to the general or circuit courts.⁵⁴

In 1795, the justices of the peace were given county-wide jurisdiction, which was exclusive and without appeal, in all debt cases in which the disputed amount did not exceed five dollars. In addition, they were given concurrent county-wide jurisdiction with the common pleas court, for which appeal was allotted to the common pleas court, in cases where the amount in controversy was between five dollars and twelve dollars.⁵⁵ On appeal, these cases were tried *de novo*.⁵⁶ By 1798, a law adopted from the Massachusetts Code vested the justices of the peace with certain powers in minor criminal matters.⁵⁷

In 1799, the second stage of territorial development began.⁵⁸ On September 25, 1799, the first legislature of the Northwest Territory convened in Cincinnati,

45. 1 MONKS, *supra* note 31, at 26.

46. 1 *id.* at 27; LAWS, *supra* note 32, at 157.

47. LAWS, *supra* note 32, at 157.

48. *Id.* at 154.

49. *Id.* at 156.

50. *Id.* at 181.

51. *Id.* at 182.

52. 1 MONKS, *supra* note 31, at 33.

53. 1 *id.* at 34.

54. LAWS, *supra* note 32, at 185-186.

55. WHITINGER, *supra* note 40, at 2-3; LAWS, *supra* note 32, at 143-149; 1 MONKS, *supra* note 31, at 31.

56. 1 MONKS, *supra* note 31, at 31.

57. LAWS, *supra* note 32, at 297-98.

58. HANDBOOK, *supra* note 25, at 48. "When the free male population, age twenty-one and older, reached 5000, the territory could advance to the second, or semi-representative, stage of government."

Ohio⁵⁹ and adopted an act establishing small claims courts in which the justices were divested of their executive powers, and their jurisdiction was reduced and made co-extensive with the township in which their court sat. In addition, new courts were established in those townships which, because of the contraction of power, were without judicial service.⁶⁰

In January of 1801, the first legislative body that met in Indiana included Governor Harrison and three judges.⁶¹ The chief purpose of this first meeting of the legislature was to establish courts and determine their jurisdiction.⁶² For this purpose, the legislature selected a law from the Pennsylvania Code.⁶³ In fact, it was essentially the same law that had been adopted by the Northwest Territory on June 6, 1795.

In 1805, one of the first acts of the legislature was the general consolidation of the local county courts.⁶⁴ The quarter sessions, common pleas, probate, and orphans' courts were all consolidated into one county court under the name of common pleas.⁶⁵ The governor was required to appoint three judges for each county court, a majority of whom were required to hold court.⁶⁶

On March 3, 1805, the U.S. Congress granted chancery power to the Territorial Supreme Court and also provided a right of appeal from its decisions to the U.S. Supreme Court in cases in which the United States had an interest.⁶⁷ After Congress cloaked these territorial judges with equity powers, the first legislature of the territory "lost little time" in establishing its own chancery court on August 22, 1805.⁶⁸ That court consisted of one judge, to be appointed by the governor of the territory, who was required to hold at least two sessions annually in Vincennes.⁶⁹

In an effort "to balance the caseloads and prevent abuses of the system which were possible due to distances which had to be traveled on horseback or by wagon," the second act of the First Indiana Legislature in 1806 imposed venue requirements on small claims litigation and increased the jurisdictional amount to eighteen dollars.⁷⁰

In 1813, the legislature passed an act reorganizing the courts of justice by

59. *Id.* at 91-92.

60. WHITINGER, *supra* note 40, at 3; LAWS, *supra* note 32, at 389-401.

61. 1 MONKS, *supra* note 31, at 24.

62. 1 *id.* at 25.

63. THE LAWS OF THE INDIANA TERRITORY, 1801-1806, at 1801-14 (Indiana, Throop & Clark 1886).

64. *Id.* at 1805-38 to 1805-41; 1 MONKS, *supra* note 31, at 40.

65. 1 MONKS, *supra* note 31, at 40.

66. 1 *id.*

67. 1 *id.* at 38.

68. 1 *id.*; THE LAWS OF THE INDIANA TERRITORY, 1801-1806, *supra* note 63, at 1805-29 to 1805-33.

69. 1 MONKS, *supra* note 31, at 38.

70. WHITINGER, *supra* note 40, at 3-4; THE LAWS OF THE INDIANA TERRITORY, 1801-1806, *supra* note 63, at 1806-xx.

abolishing the court of common pleas and circuit courts and establishing new circuit courts in their place.⁷¹ The circuit court for each circuit was to hold three sessions in each county annually. Judgments from the justice of the peace were appealable to the circuit courts,⁷² and any appeal from the circuit court was taken to the general court.⁷³

This act of reorganizing the court system into three tiers was short-lived—it was repealed on September 10, 1814.⁷⁴ However, in that same year, the legislature approved a bill establishing circuit courts once again.⁷⁵ Three circuits were established, each to be presided over by a circuit judge appointed and commissioned by the governor.⁷⁶ Additionally, each county in the circuit was allotted two associate judges to be appointed in the same manner and to assist in holding court.⁷⁷ The circuit judge and at least one associate judge were required to sit together to try any criminal offense, the punishment for which involved life, limb or imprisonment for two years or more.⁷⁸

In 1815, the legislature gave the justices of the peace courts concurrent jurisdiction with the circuit courts in the Northwest Territory in all contract actions where the amount in controversy did not exceed forty dollars, in trespass actions where the amount in controversy did not exceed twenty dollars, in rent actions where the amount did not exceed thirty dollars, and in trover and conversion cases not exceeding twenty dollars.⁷⁹ Thus, by the time Indiana was ready to seek admission to the Union, it had already gone through numerous transformations of its court system and had settled on a three-tier system which consisted of the: 1) justice of the peace courts which handled minor civil and criminal matters, 2) circuit courts which were the courts of general jurisdiction, and 3) a general court which acted as an appellate tribunal.

B. Early Statehood (1816-1850)

On April 19, 1816, Congress passed an enabling act entitled: “An Act to enable the people of the Indiana Territory to form a constitution and state government, and for the admission of such state into the Union on an equal footing with the original States.”⁸⁰ On June 10, 1816, the representatives of the territory of Indiana held a constitutional convention in Corydon and officially accepted the

71. THE LAWS OF THE INDIANA TERRITORY, 1809-1816, at 474-475 (Louis B. Ewbank & Dorothy L. Riker eds., 1934).

72. *Id.* at 478.

73. *Id.*

74. *Id.* at 562-65.

75. *Id.* at 517-22.

76. *Id.* at 517-19.

77. *Id.* at 518.

78. *Id.*

79. *Id.* at 627.

80. Act of Apr. 19, 1816, ch. 57, 3 Stat. 289.

enabling act.⁸¹ On December 11, 1816, Congress passed a resolution admitting Indiana into the Union as a state.⁸²

Article V of the 1816 Constitution established Indiana's first judiciary which consisted of one supreme court, three circuit courts, and inferior courts that the legislature may establish.⁸³ The 1816 Constitution also provided for the election of "[a] competent number of Justices of the peace . . . in each Township . . ."⁸⁴ The supreme court consisted of three judges⁸⁵ appointed by the governor with the advice and consent of the senate.⁸⁶ The supreme court had only appellate jurisdiction, but the general assembly had the authority to give it original jurisdiction in capital or chancery cases.⁸⁷ The supreme court was to sit at the seat of government, which was originally established at Corydon⁸⁸ and later moved to Indianapolis.

The original circuit courts of the new state consisted of a president judge and two associate judges.⁸⁹ The general assembly selected the president judge of the circuit court, but the people of the county elected the associate judges.⁹⁰ Originally, Indiana was divided into three circuits, but that number could be increased by the general assembly.⁹¹ The judges were to ride the circuit and hold court in their respective counties.⁹² All judges were appointed for seven-year terms.⁹³ If there was a vacancy in any court because of death, resignation, or removal, the successor was to be appointed in the same manner as the predecessor.⁹⁴

The lower courts in Indiana consisted of justices of the peace elected in each township, as needed, for five-year terms.⁹⁵ The common pleas courts, which existed during the territorial times, were eliminated by the 1816 Constitution.⁹⁶ One objection that was raised regarded the time limit placed on the judges' terms of office. The people at that time believed that good behavior, rather than a time limit, should determine a judge's tenure in office. They also felt that elected

81. Ordinance of July 10, 1816 in WEST'S ANNOTATED INDIANA CODE (Constitution and Organic Laws volume) 105 (1995).

82. Resolution of Dec. 11, 1816, 3 Stat. 399; 1 CHARLES KETTLEBOROUGH, CONSTITUTION MAKING IN INDIANA xxi (1916).

83. IND. CONST. of 1816, art. V, § 1.

84. *Id.* § 12.

85. *Id.* § 2.

86. *Id.* § 7.

87. *Id.* § 2.

88. *Id.* § 11.

89. *Id.* § 2.

90. *Id.* § 7.

91. *Id.* § 3.

92. *Id.* § 5.

93. *Id.* § 4.

94. *Id.* § 10.

95. *Id.* § 12.

96. 2 MONKS, *supra* note 31, at 532.

judges would be prone to yield their judicial independence to cater to public opinion in order to secure reelection.⁹⁷

By 1818, the neatly organized court system established by the 1816 Constitution began to unravel. A state probate court was established, and the justice of the peace court's jurisdiction became coextensive with the county, rather than the township, in some criminal and civil cases of less than fifty dollars.⁹⁸ A few years later, the existing circuits were reconfigured due to the addition of new counties.⁹⁹

Two decades after the adoption of the 1816 Constitution, Jacksonian Democracy, which advanced the equality of all citizens and popular elections for all offices, including judges, was at its pinnacle.¹⁰⁰ These ideals were first expressed by an act of the general assembly in 1829 providing for the election of probate judges in each county to seven-year terms.¹⁰¹ Further, the probate court judges could be qualified by the circuit court judges, as well as by judges of the supreme court.¹⁰² The probate court judges were no longer required to be lawyers;¹⁰³ rather, they just needed to have legal qualifications satisfactory to either the circuit court or supreme court judges.

Attempts to call constitutional conventions were unsuccessful both in 1840 and 1846.¹⁰⁴ By 1849, a constitutional referendum was supported by the legislature and resulted in a convention in 1850.¹⁰⁵ At the 1850 convention, there were attempts to abolish associate judgeships, reduce court expenses, appoint justices of the peace, and abolish the probate system by replacing it with probate circuit judges to be elected by the people.¹⁰⁶ In January 1849, once again adding to the fragmentation of the Indiana trial court system, the general assembly established a common pleas court in Marion County.¹⁰⁷

What began as a tightly organized system first established upon the creation of the new state had begun to evolve into a multi-tiered hodgepodge of different

97. 1 KETTLEBOROUGH, *supra* note 82, at xxiii.

98. 2 MONKS, *supra* note 31, at 517, 532.

99. By 1824, the original three circuits had been extended to five, and the state then consisted of fifty-one counties. Theophilus Moll, *Re-arranging the Indiana Judiciary*, 2 IND. L.J. 293, 295 (1927) (a master in chancery was to be appointed by the president judge in each county for each circuit).

100. See Maxwell Bloomfield, *Law vs. Politics: The Self-Image of the American Bar (1830-1860)*, 12 AM. J. LEGAL HIST. 306 (1968).

101. Act of June 23, 1829, ch. 29, § 1, 1829 Ind. Acts 33, 33-34 (superseded).

102. *Id.*

103. The general assembly required probate court judges to receive a certificate from "either one of the president judges of the circuit courts, or from one of the judges of the supreme court that he is qualified to discharge the duties of such office[;] [however] . . . this [requirement could] not be so construed as to require any such applicant to be a professional character." *Id.*

104. Moll, *supra* note 99, at 296-97.

105. *Id.* at 297.

106. *Id.* at 297-98.

107. 2 MONKS, *supra* note 31, at 532.

courts created by the legislature to meet specific parochial needs. With the ad hoc addition of each new court, the structure of the trial court system became more and more unrecognizable.

C. The 1851 Constitution

The 1851 Constitution became effective on November 1, 1851, and although it has been amended, it remains in effect today. The main article of the 1851 Constitution affecting the organization of the judicial system is Article VII.

Article VII of the 1851 Constitution replaced article V of the 1816 Constitution and authorized the general assembly to divide the state into various circuits.¹⁰⁸ It also abolished the three-judge circuit courts, replacing them with one-judge circuit courts.¹⁰⁹ It provided for a supreme court with a minimum of three and a maximum of five judges.¹¹⁰ The constitution required the general assembly to establish as many judicial districts as there were supreme court judges.¹¹¹ One supreme court judge had to come from each district.¹¹² The constitution also provided for the popular election of the judges of both the supreme court¹¹³ and the district courts¹¹⁴ and reduced their tenure from seven to six years.¹¹⁵ The constitution provided for justice of the peace courts as well.¹¹⁶ These courts were authorized to handle minor misdemeanors¹¹⁷ and some civil cases.¹¹⁸

Essentially, article VII established a three-tiered court system with the supreme court, circuit courts of general jurisdiction, and justice of the peace courts. However, the 1851 Constitution reserved to the general assembly the authority to establish inferior courts.¹¹⁹

No sooner than the people of this state had spoken about the organization of the court system through the replacement of their constitution, then additional revisions were made in 1852. One significant revision was that the general assembly gave mayors judicial powers equal to those enjoyed by the justices of the peace for civil and criminal offenses and exclusive jurisdiction over ordinance

108. IND. CONST. art. VII, § 9 (as adopted 1851) (amended 1970).

109. *Id.* § 8 (as adopted 1851) (amended 1970).

110. *Id.* § 3 (as adopted 1851) (amended 1970).

111. *Id.* In 1852, the general assembly created a fourth seat on the supreme court. 2 MONKS, *supra* note 31, at 531. In 1872, the general assembly added a fifth seat. 2 MONKS, *supra* note 31, at 531.

112. IND. CONST. art. VII, § 3 (as adopted 1851) (amended 1970).

113. *Id.*

114. *Id.* § 9 (as adopted 1851) (amended 1970).

115. *Id.* § 2 (supreme court) (as adopted 1851) (amended 1970); *id.* § 9 (circuit courts).

116. *Id.* § 14 (as adopted 1851) (repealed 1984).

117. Moll, *supra* note 99, at 297-98.

118. 2 IND. REV. STAT. pt. 4, ch. 1, § 10 (1852) (repealed 1975); KETTLEBOROUGH, *supra* note 82, at 249-59.

119. IND. CONST. art. VII, § 1 (as adopted 1851) (amended 1970).

violations.¹²⁰ However, a violation of town ordinances was reserved to the justices of the peace, thus making a distinction between the city and town courts.¹²¹ Also, pursuant to the new amendments, the associate judges for the various counties performed administrative, as well as judicial, duties.¹²²

Also in 1852, the general assembly abolished the old probate courts¹²³ and established common pleas courts in their stead.¹²⁴ Although the state was divided up into forty-three districts with one judge,¹²⁵ these courts were really county courts.¹²⁶ The common pleas courts had exclusive jurisdiction over probate matters.¹²⁷ They had concurrent jurisdiction with the circuit courts over various items relating to probate matters, e.g. guardianships, estates, and actions against heirs and devisees.¹²⁸ They also had jurisdiction (concurrent with the circuit court) over civil cases with an amount in controversy under \$1000¹²⁹ and original jurisdiction over misdemeanors.¹³⁰ An appeal from the common pleas court could be made to the circuit courts or directly to the supreme court.¹³¹ Moreover, the common pleas courts had appellate jurisdiction over the justice of the peace courts.¹³²

Finally, the judge of the common pleas court was to preside over a newly created court of conciliation.¹³³ A judgment from this court was not binding unless the parties so agreed.¹³⁴ If they agreed, there was no appeal,¹³⁵ nor could they bring a similar action in another court.¹³⁶ This allowed the parties to resolve the dispute without having to go through the formalities of the circuit court process.¹³⁷

In 1865, the general assembly abolished the courts of conciliation¹³⁸ and

120. 1 IND. REV. STAT. ch. 17, § 18 (1852) (repealed 1857); Moll, *supra* note 99, at 298-99.

121. 2 IND. REV. STAT. ch. 108, § 57 (1852) (superseded); Moll, *supra* note 99, at 298-99.

122. 1 MONKS, *supra* note 31, at 310. Today, county commissioners fulfill the administrative duties once performed by a circuit judge.

123. 2 IND. REV. STAT. pt. 1, ch. 8, § 43 (1852) (superseded).

124. *Id.* § 1 (superseded).

125. *Id.* § 3 (superseded).

126. Some of the common plea courts served more than one county. *Id.* See also 2 MONKS, *supra* note 31, at 519 (stating that common pleas courts were really county courts).

127. 2 IND. REV. STAT. pt. 1, ch. 8, § 43 (1852) (superseded).

128. *Id.* § 5 (superseded).

129. *Id.* § 11 (superseded).

130. *Id.* § 14 (superseded) (common pleas courts had original jurisdiction except where the justice of peace court had exclusive jurisdiction).

131. *Id.* § 13 (superseded).

132. *Id.*

133. 2 IND. REV. STAT. pt. 2, ch. 2, § 2 (1852) (repealed 1865); 1 MONKS, *supra* note 31, at 346-47.

134. 1 MONKS, *supra* note 31, at 347.

135. 2 IND. REV. STAT. pt. 2, ch. 2, § 6 (1852) (repealed 1865).

136. *Id.*

137. 1 MONKS, *supra* note 31, at 347.

138. Act of Nov. 30, 1865, ch. 57, § 1, 1865 Ind. Acts 163, 163.

established criminal courts for any county having more than 10,000 voters.¹³⁹ Two years later, the general assembly authorized the organization of criminal circuit courts in any county with a population of 7000 or more.¹⁴⁰ Unlike the regular circuit court judge, who enjoyed a six-year term, criminal court judges were elected to four-year terms.¹⁴¹ In 1881, the general assembly changed the title of the criminal circuit courts to criminal courts.¹⁴² At this time, there were only two criminal courts in the state, one in Allen County and one in Marion County. However, by 1883, the Allen Criminal Court was abolished leaving only the Marion Criminal Court in existence.¹⁴³

By 1871, the larger metropolitan communities felt the ever increasing demand for more judicial resources, and the general assembly established superior courts in counties which contained an incorporated city of at least 40,000.¹⁴⁴ Two years later, the common pleas courts were abolished, and their business, including the probate matters that had been pending there since the abolition of the probate courts, was transferred to the circuit court.¹⁴⁵

As previously mentioned, the 1851 Constitution also provided that a competent number of justices of the peace were to be elected by the voters of each township.¹⁴⁶ The general assembly gave the county commissioners the discretion to determine the number of justices for each township.¹⁴⁷ However, the general assembly provided that there be no more than two per township with one additional justice for each township that contained an incorporated town or city.¹⁴⁸ Because it chose not to alter the jurisdiction of the mayors, the general assembly also reaffirmed the responsibility of mayors in fulfilling various judicial functions

139. Act of Dec. 20, 1865, ch. 45, §§ 2, 5, 1865 Ind. Acts 150, 150-51 (repealed 1981). Only Marion County qualified at that time. See Act of Dec. 20, 1865, ch. 48, § 1, 1865 Ind. Acts 153, 153 (repealed 1893).

140. Act of Mar. 8, 1867, ch. 16, § 1, 1867 Ind. Acts 77, 77-78 (repealed 1881). However, by 1869, the requirement for the establishment of a criminal circuit court had been further amended to authorize one in any county in which there was an incorporated city with a resident population of 10,000 or more, without regard to the number of voters contained in the county. Act of Apr. 23, 1869, ch. 21, § 6, 1869 Ind. Acts 46, 48 (superseded).

141. Act of May 13, 1869, ch. 25, § 2, 1869 Ind. Acts 52, 52 (repealed 1978).

142. Act of Apr. 12, 1881, ch. 34, § 8, 1881 Ind. Acts 111, 112 (repealed 1978).

143. Act of Feb. 27, 1883, ch. 29, § 1, 1883 Ind. Acts 33, 33 (expired).

144. Act of Feb. 15, 1871, ch. 22, § 1, 1871 Ind. Acts 48, 48-49 (repealed 1975). Only Marion County qualified, but later legislation allowed counties of smaller populations and even two counties to be united in a circuit for circuit court purposes. 1 MONKS, *supra* note 31, at 351.

145. Act of Mar. 6, 1873, ch. 29, § 80, 1873 Ind. Acts 87, 96-97 (repealed 1981).

146. IND. CONST. art. VII, § 14 (as adopted 1851) (repealed 1984).

147. Act of Mar. 8, 1883, ch. 130, § 1, 1883 Ind. Acts 190, 190-91 (repealed 1975); DAVID McDONALD, A TREATISE ON THE POWERS AND DUTIES OF JUSTICES OF THE PEACE, MAYORS, MARSHALS, AND CONSTABLES IN THE STATE OF INDIANA § 1 (Cincinnati, Robert Clarke & Co., Louis O. Schroeder ed., rev. ed. 1883).

148. Act of Mar. 8, 1883, ch. 130, § 1, 1883 Ind. Acts 190, 190-91 (repealed 1975).

similar to those executed by the justices of the peace.¹⁴⁹ In fact, mayors had greater jurisdiction than the justices of the peace because mayors could hear cases punishable by fine and imprisonment, so long as the fine did not exceed twenty-five dollars and the period of imprisonment did not exceed thirty days.¹⁵⁰

By 1889, the Indiana Court of Claims was established to hear actions against the state.¹⁵¹ The court of claims was, in reality, the Marion County Superior Court, and appeals from that court were taken directly to the supreme court.

Because the supreme court was unable to eradicate its docket, the general assembly provided for the appointment of five commissioners to help the supreme court with its caseload.¹⁵² These supreme court commissioners were the forerunners of the appellate court which was temporarily created in 1891, to relieve the supreme court's congested docket. The governor was to appoint five judges, no more than three of whom could belong to the same political party, one being from each of the five judicial districts established for the selection of supreme court justices.¹⁵³ The general assembly made the appellate court permanent in 1901.¹⁵⁴

By the end of the century, the state had on two occasions set up an organized system of courts, once at the state's inception and again with the adoption of the 1851 Constitution. The latter system had two tiers of trial courts with the circuit courts as the courts of general jurisdiction and the justice of the peace courts handling minor matters. However, soon after adopting this system, the general assembly began tinkering with the organization of the courts once again. Further, the legacy of Jacksonian Democracy and its doctrine advocating the political election of almost all public servants remained firm. However, there was public support for electing judges at different times to avoid the partisan influence on judicial races and to focus public attention solely on the judicial branch. As a result, during the next century there would be movements to pull the judiciary away from the partisan political arena.

D. The Court System in the 20th Century

By the turn of the century, the Indiana Supreme Court continued to consist of five members and had jurisdiction over appeals from the circuit courts. The members of the court were selected from five geographic districts and enjoyed six-year terms. In 1901, the year the appellate court was made permanent, a sixth

149. For example, they could hold city court with exclusive jurisdiction over violations of bylaws and ordinances of the city and townships in which the city was situated. *See* Act of Mar. 14, 1867, ch. 15, § 17, 1867 Ind. Acts 33, 37-38 (superseded).

150. *Id.*

151. Act of Mar. 9, 1889, ch. 128, § 1, 1889 Ind. Acts 265, 265 (repealed 1985).

152. Act of Feb. 22, 1889, ch. 32, § 1, 1889 Ind. Acts 41, 41. The supreme court declared this act unconstitutional. *State ex rel. Hovey v. Noble*, 21 N.E. 244 (Ind. 1889).

153. Act of Feb. 22, 1889, ch. 32, § 1, 1889 Ind. Acts at 41.

154. For a detailed history of the Indiana Appellate Court, see Robert H. Staton & Gina M. Hicklin, *The History of the Court of Appeals of Indiana*, 30 IND. L. REV. 203 (1997).

member was added to the court, and it was split into two divisions.¹⁵⁵ The state was divided into two districts, northern and southern, and the appellate court judges had to reside in their respective districts.¹⁵⁶

At the turn of the century, the general assembly also directed its attention to the trial courts. After having been confronted with the growing problem of juvenile offenders, the general assembly created the juvenile court system in 1903 providing a separate juvenile court for each county with a population over 100,000.¹⁵⁷ In all other counties, the circuit court judge presided over the juvenile court.¹⁵⁸

The city courts were also established by the general assembly after the turn of the century.¹⁵⁹ City court judges were elected to four-year terms¹⁶⁰ and had exclusive jurisdiction over city ordinances and concurrent jurisdiction over violations where the penalty was less than five hundred dollars or six months imprisonment.¹⁶¹ All appeals were heard *de novo* in the circuit court or the criminal court.¹⁶²

In 1925, the general assembly established municipal courts in counties containing an incorporated city of at least 300,000.¹⁶³ At this time, only Marion County qualified for such a court. Each municipal court consisted of four judges appointed by the governor for four-year terms. Not more than two of the judges

155. Act of Mar. 12, 1901, ch. 247, § 2, 1901 Ind. Acts 565, 565 (repealed 1971). In 1959, the general assembly increased the number of judges from six to eight authorizing the governor to appoint the two new judges, one from each district and one from each party. These judges were to serve until succeeding judges were elected at the next election. Act of Mar. 12, 1959, ch. 238, 1959 Ind. Acts 567 (repealed 1971).

156. Act of Mar. 12, 1959, ch. 238, §§ 3-4, 1959 Ind. Acts 567 (repealed 1971).

157. Act of Mar. 10, 1903, ch. 237, §§ 1-12, 1903 Ind. Acts 516; §§ 1-2 (repealed 1963); §§ 3-12 (repealed 1978). In 1931, the population requirement was increased to 300,000. Act of Mar. 2, 1931, ch. 43, 1931 Ind. Acts 102 (amended 1945). It was lowered to 250,000 in 1945, thereby creating juvenile courts in Marion, Allen and Lake Counties. Act of Mar. 9, 1945, ch. 237, § 1, 1945 Ind. Acts 1647, 1647 (repealed 1978). The Allen County Juvenile Court was abolished in 1971, and the jurisdiction therein was transferred to the Allen Superior Court. Act of Apr. 8, 1971, No. 429, §§ 1, 4, 1971 Ind. Acts 2007, 2007 (repealed 1982). Similarly, the Lake County Juvenile Court was abolished in 1973, and the Marion County Juvenile Court was abolished in 1978. Act of Apr. 23, 1973, No. 308, 1973 Ind. Acts 1651 (codified as amended at IND. CODE § 33-5-29.5-1 to -71 (1993 & Supp. 1996); Act of Mar. 10, 1978, No. 136, § 45, 1978 Ind. Acts 1196, 1281. *See* IND. CODE § 33-5.1-2-4 (Supp. 1996) (jurisdiction of Marion Superior Court includes juvenile cases).

158. Act of Mar. 10, 1903, ch. 237, § 1, 1903 Ind. Acts at 516-17.

159. Act of Mar. 6, 1965, ch. 129, § 215, 1905 Ind. Acts 219, 375 (repealed 1980). The creation of the Marion County Municipal Court abolished the Indianapolis City Court.

160. *Id.* § 216 at 376 (repealed 1980).

161. *Id.* § 217 at 377 (repealed 1980).

162. *Id.*

163. Act of Mar. 12, 1925, ch. 194, § 1, 1925 Ind. Acts 457, 457 (repealed 1995).

on each court were to be appointed from any one political party.¹⁶⁴ Unlike their counterparts in other communities, appeals from the civil docket went generally to the appellate court. Violations of city or town ordinances, which were regarded as criminal offenses, were appealed to the circuit court for trial de novo.¹⁶⁵ The creation of municipal courts eradicated any city court which existed in that same county, effective January 1, 1926.¹⁶⁶

To further supplement trial court resources, the legislature authorized the creation of magistrate courts in 1939.¹⁶⁷ A subsequent amendment in 1941 authorized magistrate courts in those counties in which the population exceeded 40,000 and there was no city judge.¹⁶⁸ These magistrate judges were appointed by the circuit court judge for a three-year term¹⁶⁹ and no more than one-half of the magistrates could be from one party.¹⁷⁰ The magistrate court had original jurisdiction over traffic laws and ordinances and concurrent jurisdiction with other courts over criminal cases where the penalty sought was less than five hundred dollars or six months in jail.¹⁷¹ Like the municipal courts, appeals from a magistrate court were taken to the circuit court de novo.¹⁷²

Subsequently, town courts were created in 1961.¹⁷³ The board of trustees of a town had the authority to create a town court in all counties except Lake, Marion, and Allen which probably had enough judicial resources to handle the types of cases entrusted to town courts. Town judges were elected to four-year terms and vacancies could be filled by the town board.¹⁷⁴ The town court's jurisdiction was similar to that of the city courts and appeals were, likewise, taken to the circuit court de novo.¹⁷⁵

By the last quarter of the 20th century, Indiana had a multiplicity of courts which included: The supreme court, court of appeals, circuit, superior, criminal, juvenile, probate, municipal, justice of the peace, city, town, and magistrate courts. When a need for additional judicial resources arose, the general assembly's response was to create an autonomous court.

In 1965, the general assembly authorized the first truly unified court in

164. *Id.* § 3 at 458 (repealed 1995).

165. *Id.* § 11 at 460-61 (repealed 1980).

166. *Id.* § 14 at 461 (repealed 1995).

167. Magistrates Court Act, ch. 164, § 1, 1939 Ind. Acts 753, 753-54 (codified as amended at IND. CODE §§ 33-7-1-1 to -8 (1971)). The magistrate courts survived until January 1, 1976. Act of May 5, 1975, No. 305, § 54, 1975 Ind. Acts 1667, 1702 (repealing IND. CODE §§ 33-7-1-1 to -8 (1971)).

168. Act of Mar. 3, 1941, ch. 80, § 1, 1941 Ind. Acts 200, 200 (repealed 1975).

169. Act of Mar. 10, 1939, ch. 164, § 2(c), 1939 Ind. Acts at 756. (Interestingly, the magistrate's term also expired when the circuit judge left office.) *Id.*

170. *Id.* § 2(a).

171. *Id.* § 4 at 759-60 (repealed 1975).

172. *Id.* § 6(f) at 762 (repealed 1975).

173. Act of Mar. 6, 1961, ch. 76, § 1, 1961 Ind. Acts 144, 144-45 (repealed 1978).

174. *Id.* §§ 2-3 (repealed 1978).

175. *Id.* §§ 1-2 (repealed 1978).

Indiana, the St. Joseph Superior Court.¹⁷⁶ In a unified system, no new court is created in response to a need for increased judicial resources as in an autonomous court system. Instead, a new judge is added to the existing court to help relieve an overcrowded docket. For example, before unification, St. Joseph County had two superior courts. However, as a result of the 1965 act, they were merged into one court with an additional judge.¹⁷⁷ Thus, the court consisted of three judges who worked together and shared the responsibility of the management of the cases entrusted to that court.

In 1966, the Judicial Study Commission recognized that Indiana's court structure was fragmented, disorganized, and inefficient. To remedy these problems, the commission recommended that all Indiana courts be organized pursuant to a unified court system like the St. Joseph Superior Court, rather than the autonomous court system that then existed in Indiana.¹⁷⁸ In addition to proposing more judges, rather than more courts, advocates of the unified court structure also wanted to eliminate several of the inferior trial courts. They maintained that consolidating the courts into fewer levels was certain to be more efficient.¹⁷⁹ However, those resisting changes in the current system argued that municipal courts, city courts, and county courts were essential cogs in the judicial machinery. They argued that trivial matters such as traffic violations and small claims should not be thrown into the same hopper with murder cases and million-dollar products liability claims.¹⁸⁰

In response, those who promoted the unified court system contended that creating courts to handle inferior matters is equivalent to creating inferior courts and placing the judges in such courts in an inferior status. Allowing these courts to continue in their inferior status, as such,

tends to reduce the public expectation of them. It excuses the low judicial salaries, inadequate pensions, and poor courtrooms that have frequently identified these courts. Its most damaging effect, however, is that it makes recruitment of good judges difficult.

Assigning to them only minor matters places them outside of the interest of the more influential members of the bar. As attorney fees in these courts are relatively low in comparison to others, the lawyers who practice in them are often either the inexperienced or are those willing to take the lower paying cases. Because of this, attorneys who become acquainted with the problems of these courts sometimes lack the ability or influence to help them. Thus they are consistently neglected by bar

176. Act of Mar. 11, 1965, ch. 266, 1965 Ind. Acts 727 (codified as amended at IND. CODE §§ 33-5-40-1 to -72 (1993 & Supp. 1996)).

177. *Id.* § 1 (codified as amended at IND. CODE § 33-5-40-1 (1993)). At present, St. Joseph County has eight superior court judges. IND. CODE § 33-5-40-1 (1993).

178. JUDICIAL STUDY COMM'N, 1966 REPORT 88-90 (1966).

179. Lowe, *supra* note 15, at 320.

180. Truax, *supra* note 16, at 328.

associations.¹⁸¹

Further, another proponent of unification argued that:

even small causes call for a high type of judge if they (the cases) are to be determined justly as well as expeditiously. A judge with the position and title of Judge of the Court or Justice of the State . . . is none too good for cases which are of enough importance to the parties to bring to the court and hence ought to be important to a state seeking to do justice to all.¹⁸²

Although the pleas of many throughout the nation were for court reform through unification,¹⁸³ the Indiana General Assembly was unwilling to make such sweeping changes at the same time it amended the judicial article. However, by 1975, the general assembly had enacted the County Court Law which revamped the organization of Indiana trial courts of limited jurisdiction by replacing them with county courts.¹⁸⁴ The County Court Law provided for the immediate elimination of the justice of the peace courts and for the elimination of the city and town courts at a later date.¹⁸⁵ However, before the date upon which the city and town courts were to be eliminated, the general assembly enacted a statute granting cities and towns the authority to create or abolish city and town courts for themselves.¹⁸⁶ Thus, the legislature thwarted its own attempts at unification and simplification of the trial court system.

Pursuant to the County Court Law, sixty-four counties would either have their own county court or would share one with another county.¹⁸⁷ In those communities that were not serviced by a superior court or a county court, the responsibility for the management of the cases that had previously been handled by the justices of the peace: small claims, misdemeanor, and traffic, fell to the court of general jurisdiction, the circuit court.¹⁸⁸

Subsequently, the general assembly created and established small claims courts in those counties containing a consolidated city of the first class.¹⁸⁹ Marion was the only county that qualified. The Marion County Small Claims Court was composed of one or more divisions, one for each township within the county.¹⁹⁰ The judges of the small claims court were elected for four-year terms, by the

181. *Id.* at 327-28.

182. Pound, *supra* note 14, at 226.

183. See Glenn R. Winters, *Trends in Court Reform*, 50 JUDICATURE 310 (1967).

184. Act of May 5, 1975, No. 305, § 48, 1975 Ind. Acts 1667, 1683-1701 (codified as amended at IND. CODE §§ 33-10.5-1-1 to 33-10.5-8-4 (1993 & Supp. 1996)) (However, the Marion Municipal Courts, which were inferior courts of limited jurisdiction, continued to exist.)

185. *Id.* § 55 (abolishing city and town courts). *Id.* § 54 (abolishing justice of the peace courts).

186. IND. CODE § 33-10.1-1-3 (1993).

187. IND. CODE § 33-10.5-2-2 (1976) (repealed 1977).

188. AMERICAN JUDICATURE SOC'Y, INDIANA TRIAL COURTS 37 (1976).

189. IND. CODE § 33-11.6-1-3 (1993).

190. IND. CODE § 33-11.6-1-5 (1993).

registered voters residing within the township.¹⁹¹ Appeals from judgments of the small claims court were taken directly to the municipal court of the county and tried de novo.¹⁹² Thereafter, the appeals from the municipal court went directly to the Indiana Court of Appeals.¹⁹³ The only other significant activity of the general assembly regarding court structure during the 1980s was to increase the number of judges and districts on the Indiana Court of Appeals¹⁹⁴ and create the Indiana Tax Court, which had exclusive jurisdiction over any case that arose under the tax laws of the state.¹⁹⁵

Attempts to unify the courts on a local basis continued through efforts initiated in 1986 by the Indiana Judges Association.¹⁹⁶ That association was able to persuade the general assembly to create a commission to address the lack of uniformity in the Indiana court system.¹⁹⁷ The Commission on Trial Courts consisted of eight legislators, the Chief Justice of Indiana, a trial judge, a member of a county council, a member of the county commissioners, and a county clerk.¹⁹⁸ It noted that 118 legislative proposals concerning either the creation of new courts, the upgrading of county courts to superior courts, or the changing of subject matter jurisdiction of the particular courts had been presented to the general assembly during its last six sessions.¹⁹⁹ After conducting field hearings, meetings and opinion surveys, the Commission recommended that all trial courts in each circuit be merged into a single court with one or more judges to be specified by statute dependent upon the needs of the community for judicial resources.²⁰⁰ Further, the Commission recommended against a multi-county organization except to the extent of permitting courts to share the cost of probation, public defender programs, and juvenile detention facilities. As a result of the Commission's recommendations, Senate Bill 12 was introduced in the 1989 general assembly. However, because Senate Bill 12 also sought to transfer the funding of the court system from the counties to the state, it was rejected by the general assembly, effectively killing any success for the other proposals contained in the bill.²⁰¹

As of 1995, no statewide attempt to unify the courts had been undertaken.

191. *Id.* § 33-11.6-3-1 (Supp. 1996).

192. *Id.* § 33-11.6-4-14 (1976) (current version at IND. CODE § 33-11.6-4-14 (Supp. 1996)). Appeals are now taken to the county superior court and tried de novo.

193. *Id.* § 33-10.5-7-10 (Supp. 1996).

194. *Id.* § 33-2.1-2-2 (Supp. 1996).

195. *Id.* §§ 33-3-5-1 to -20 (1993 & Supp. 1996); *State v. Sproles*, 672 N.E.2d 1353 (Ind. 1996).

196. *See* PROPOSAL, *supra* note 1.

197. Act of May 6, 1987, No. 300, § 4, 1987 Ind. Acts 2939, 2941-42 (expired 1988).

198. PROPOSAL, *supra* note 1, at iii.

199. INDIANA LEGISLATIVE SERVS. AGENCY, FINAL REPORT OF THE COMMISSION ON TRIAL COURTS 1 (1988).

200. *Id.* at 20.

201. *Id.* at 15. In 1987, the Commission noted that the state revenue from the courts exceeded the state expenditure on courts by \$7,850,095, whereas the county expenditure on the courts exceeded the revenues generated from the fees collected by \$32,609,175. *Id.*

However, attempts have been made on a piecemeal basis. For example, the Monroe Superior Court, which consisted of five judges, was merged with the Monroe Circuit Court and became the Monroe Unified Circuit Court consisting of six judges.²⁰² Additionally, the Marion County Municipal Courts were absorbed into the Marion Superior Courts.²⁰³

Although during the 20th century there was some response to the reformers' proposals for unification in that the general assembly eliminated some of the inferior trial courts, no other significant steps toward statewide unification were made. Today, Indiana's trial court system remains fragmented, unorganized, and inefficient.

III. JUDICIAL SELECTION

Initially, the justices of the Indiana Supreme Court were appointed by the governor with the advice and consent of the senate. The president judge of the circuit court was selected by the general assembly, and the associate judges of the circuit court were elected by the people. A review of Indiana's history of judicial selection reveals an evolution from the original appointment of judges, to the election of judges pursuant to the 1851 Constitution, to the current hybrid method of selection in which the judges of the appellate and supreme courts are selected by merit, and most of the trial court judges are elected.

The method of selecting judges has been debated throughout the nation for years. As early as 1929, the American Bar Association actively discussed moving the selection of judges away from the traditional political contest.²⁰⁴ Such proposals included selecting judges without regard to party affiliation, for longer terms, and at elections other than the general elections.²⁰⁵

The same concerns about judicial independence and selecting judges through the political process were addressed by the members of the bar in 1934.²⁰⁶ One of its subcommittees on the administration of justice noted that while some judges were overutilized, some were grossly underutilized.²⁰⁷ To resolve this problem, it was suggested that the chief justice should be authorized to transfer judicial

202. IND. CODE §§ 33-4-10-1 to -8 (1993 & Supp. 1996). As explained in the testimony before the House of Representatives and Senate, the Monroe Superior and Circuit Courts had been de facto unified since January 1981 when James N. Dixon, formerly of the superior court, was elected to the circuit court, and joined the circuit court judges in a unification program merging the courts' budgets, probation departments, and scheduling and general administration. See LOCAL COURT RULES OF MONROE CIRCUIT AND SUPERIOR COURTS.

203. Act of May 3, 1995, No. 16, §§ 17-22, 1995 Ind. Acts 1513, 1533-37.

204. William H. Eichorn, *Some Present Day Problems of the Bench*, 4 IND. L.J. 260, 261 (1929).

205. *Id.* at 261 (separate judicial elections were authorized by a provision of the Indiana Constitution). IND. CONST. art. II, § 14.

206. Maurice E. Crites, *The Work of the Courts*, 10 IND. L.J. 77 (1934).

207. *Report of the Indiana State Committee on Governmental Economy on the Administration of Justice in Indiana*, 10 IND. L.J. 111, 115-19 (1934).

personnel from one circuit to another.²⁰⁸ Further, the subcommittees suggested that judges should be appointed rather than elected with the aid of “a judicial council” to advise the governor in the selection process.²⁰⁹ The general assembly did not accept the recommendation to change the selection method but did follow the committee’s suggestion to establish a judicial council to study the court system and provide information and recommendations to the general assembly.²¹⁰ The Council was immediately organized and undertook to solicit opinions from Indiana practitioners. Most lawyers surveyed desired the elimination of party politics in the selection of judges (though a majority could not countenance direct gubernatorial appointment of trial court judges) and the reallocation of judicial personnel.²¹¹ The Council accepted the survey’s results and recommended the non-partisan election of judges.

By 1940, the Judicial Council advocated sweeping changes to Article VII of the Indiana Constitution by proposing that judges either be appointed or elected on a non-partisan basis. However, this proposal, which was one of fifteen suggested amendments to the state’s constitution, was rejected by the general assembly in 1944.²¹²

Again in 1956, the Indiana State Bar Association advocated that judges not be a part of the partisan political process.

The fact is that the non-partisan system proposed by the Indiana State Bar Association would remove from a few party bosses the power they now invoke in selection at will the nominees for Supreme and Appellate Court benches, in convention, where nomination of these judges is all-too-frequently a matter of trading votes or geographically balancing a ticket; would remove from the hands of local party bosses the power of hand-picking candidates for trial court benches and would give to all voters the power to vote in both the primary and general elections for the candidate for the bench who the people feel is best qualified without deterrence of having to desert their own political party or cross party lines to do so.

By placing judicial candidates on a non-partisan ballot the voters could remain in their own party in selecting nominees for administrative and legislative office in the primary and not be required to “scratch” their ballot in the general election to avail themselves of the opportunity to select the best qualified person for judicial office.²¹³

Criticism of the political selection process continued in the 1960s. It was

208. *Id.* at 127 (In 1975 such a provision was enacted and has since been greatly underutilized. IND. CODE § 33-2.1-7-8 (1993)).

209. *Id.* at 136.

210. Act of Mar. 6, 1935, ch. 131, 1935 Ind. Acts 474 (repealed 1965).

211. INDIANA JUD. COUNCIL, FIRST ANNUAL REPORT 7, 10-11 (1936).

212. KETTLEBOROUGH, *supra* note 82, at 98.

213. Robert Hollowell & Ralph Hamill, *Judicial Selection and Tenure in Indiana a Challenge to the Bar*, RES GESTAE, Nov.-Dec., 1959, at 5, 5.

noted that partisan elected judges were an abnormality in the world except in the United States and Soviet Union.²¹⁴ However, others suggested that this method had come about not because of any dissatisfaction with the judiciary but as a reflection of the outburst of Jacksonian Democracy.²¹⁵

In 1959, the Indiana State Bar Association lobbied for the non-partisan election of judges. However, the bills presented in that year suffered a quiet defeat.²¹⁶ Subsequently, in 1961, the same proposal, known as the Indiana Plan, was polished and resurrected.²¹⁷ The various bills introduced under the plan provided for the judicial ballot to be separate from all other ballots at the general election and that it would not bear any party emblems.²¹⁸ If the incumbent judge intended to seek reelection, he or she announced his or her intention and would run in the November general election.²¹⁹ Any other candidates for judicial office would petition to have their names included on a special judicial ballot in the primary election and the candidate receiving the greatest number of votes in that contest would oppose the incumbent judge in the general election.²²⁰ On the judicial ballot in the November election, the incumbent judge's name would appear first and would be identified as the present judge.²²¹ In both the primary and general elections, candidates for judge were to be prohibited from participating in campaign activity and could not be slated by any political party.²²² Political parties were even prohibited from expending monies to influence the election of a judge.²²³ Although the Indiana State Bar Association extensively campaigned in support of these bills, they were defeated.

One of the biggest criticisms of the Indiana Plan was that a candidate judge would have to personally run his own campaign which would entail a great deal of a candidate's time and financial resources. Critics feared that the electorate would be unable to put the best candidate into office because the voters would have no way of determining which candidate was the most qualified, inasmuch as the burden of informing the electorate of a candidate's qualifications was placed solely upon the candidate.²²⁴ The 1966 Judicial Study Commission recognized

214. Note, *Judicial Selection and Tenure in Indiana: A Critical Analysis and Suggested Reform*, 39 IND. L.J. 364, 365 (1964) [hereinafter *Judicial Selection and Tenure*]; E. Blythe Stason, *Judicial Selection Around the World*, 41 J. AMER. JUD. SOC. 134, 141 (1958).

215. *Judicial Selection and Tenure*, *supra* note 213, at 364-65.

216. *Id.* at 372 & n.40.

217. *Id.* at 372-73 nn.41 & 44. The 1961 Indiana Plan was composed of three bills. S. 378-80, 92nd Gen. Ass'y, 1st Sess. (Ind. 1961). Only Senate Bill 378 was called out and voted upon. However, it was defeated 34-16. INDIANA SENATE JOURNAL, 92nd Gen. Ass'y, 1st Reg. Sess. 503 (Ind. 1961).

218. Ind. S. 379 § 2.

219. Ind. S. 378 § 1.

220. *Id.* §§ 7, 8.

221. *Id.* § 5.

222. *Id.* § 7-9.

223. *Id.* § 9.

224. *Judicial Selection and Tenure*, *supra* note 214, at 374-76.

these shortcomings of the Indiana Plan and rejected it as an undesirable method of judicial selection.²²⁵

During the 1960s, the state bar began to consider a more radical alternative than even non-partisan election—merit selection. In February 1960, Robert A. Leflar addressed the Indiana State Bar and proposed the adoption of the Missouri Plan, which provided that a judicial nominating commission would screen and recommend candidates to the appointing authority and the appointee would thereafter be retained or rejected by the voters.²²⁶

The 1966 Judicial Study Commission proposed merit selection for judges, abolition of terms of court, and the establishment of a judicial conference for the education of trial and appellate court judges in Indiana.²²⁷ However, this was not the first time that Indiana had considered the merit selection of trial judges. In 1948, the Indiana Judicial Council recommended an amendment to article VII of the Indiana Constitution based upon the Missouri Plan which had received wide support throughout the country.²²⁸ The report concluded that the administration of justice should be on a non-political basis and judges should enjoy substantial security in their tenure in office. The proposal sought to increase the terms of office of all principal judges to a minimum of eight years, and vacancies in the office of judge would be filled by appointment by the governor from a panel of three upon recommendation of a non-partisan commission.²²⁹ Any judge, whether appointed or elected, could be recalled by the electors.²³⁰ The general assembly, however, failed to approve the proposed amendment.

Thereafter, Professor Leflar urged groups other than the state bar to enter the discussion for reform.²³¹ He had specifically urged business groups and the League of Women Voters to get actively involved in the promotion of reform. By 1966, the League of Women Voters of Indiana was actively advocating the modification of the trial courts into a single-tier system and the adoption of the merit selection plan for selection of judges at all levels of the state's judiciary.²³²

In 1965, the legislature replaced the Indiana Judicial Council with the Indiana Judicial Study Commission, which took up the call for reform.²³³ The Commission's proposal advocated a unified court system with more central management at the district level and the adoption of the merit selection plan for selecting jurists.²³⁴ The academic and business communities similarly advocated

225. See JUDICIAL STUDY COMM'N, *supra* note 178, at 119.

226. Robert A. Leflar, *The Quality of Judges*, 35 IND. L. J. 289, 292-93 (1960).

227. JUDICIAL STUDY COMM'N, *supra* note 178, at 124-29.

228. INDIANA JUD. COUNCIL, 1948 ANNUAL REPORT 15-18 (1948).

229. JUDICIAL STUDY COMM'N, *supra* note 178, at 121-23.

230. *Id.* at 122.

231. Leflar, *supra* note 225, at 304-05.

232. *To Establish Justice*, IND. WOMAN VOTER, Jan. 1966, at 1, 1-2.

233. JUDICIAL STUDY COMM'N, *supra* note 178.

234. Theodore D. Nering, *An Effective Judicial Department for Indiana*, RES GESTAE, Apr., 1968, at 5, 5-10. Mr. Nering served as the first executive secretary of the Indiana Judicial Study Commission.

a more structured trial court system with the allocation of judicial resources beyond the confines of the county structure.²³⁵

Ultimately, the general assembly adopted merit selection for the judges of the supreme court and the court of appeals, but rejected the proposal for merit selection of trial judges.²³⁶ However, the general assembly later accepted the idea of merit selection for counties in the major metropolitan areas of the state. Those counties were Lake, St. Joseph, Allen, and Vanderburgh, which contained the State's second through fifth largest cities.²³⁷

Marion County initially had a bipartisan selection plan for its municipal courts. This later was changed to the unique "odd man out" system for superior court elections.²³⁸

By the 1970s, Hoosiers' reluctance to abandon the Jacksonian requirement that all public officials be elected had waned. Significant inroads had been cut into the partisan political forest previously blanketing the state. Yet, the legislature's control of the local courts by the political ballot continues today. Currently, trial judges in Indiana are partisanly elected in eighty-seven counties, elected in non-partisan elections in two counties (Allen and Vanderburgh), selected by merit selection in two counties (Lake and St. Joseph), and elected in the unique "odd man out" system in one county (Marion).

IV. RECENT REFORM PROPOSALS

Having wandered through the developments of the Indiana judiciary and changes in the method of selecting Hoosier judges, this Article turns to recent attempts at reform and reforms which can be expected in the future. The bar, as well as business and legislative study groups, have consistently advocated eradicating both the multi-tier trial court system and the politicalization of judge selection. The movement toward these changes has been advanced most recently by the Indiana Judges Association. A past president of the association, Wesley W. Ratliff, appointed a committee to study, survey, and make recommendations

235. A. James Barnes and Malcolm L. Morris, *A Report on the Management of the Indiana Trial Court System*, IND. BUS. REV., Jan.-Feb. 1969, at 7, 7-12.

236. H.R.J. Res. 12, 96th Gen. Ass'y (Ind. 1967).

237. The Allen and Vanderburgh County merit selection plans in predominantly Republican communities were changed to non-partisan selection methods in 1983. IND. CODE § 33-5-5.1-29.1 (1993) (Allen County) and IND. CODE § 33-5-43.2-1 (1993) (Vanderburgh County). The legislature, historically Republican, retained the merit selection system in the predominantly democratic counties of Lake and St. Joseph. Attempts to return Lake and St. Joseph counties to partisan election or non-partisan election by the Democratic House of Representatives were rejected by the Republican Senate in both 1993 and 1994.

238. IND. CODE § 33-5.1-2-8 (Supp. 1996). The "odd man out" method of selecting judges permitted political parties to nominate not more than eight candidates for superior court judge. Then, at the following general election, the electorate would vote for fifteen of the candidates. The candidates with the highest number of votes would then fill any vacancies.

concerning the reform of Indiana's judiciary.²³⁹ In 1978, the committee recommended: 1) a single-tier trial court system, 2) establishment of districts, and 3) selection of all judges by merit selection.²⁴⁰ These same proposals were again made by the Indiana Judges Association in 1986. Although the Association was unsuccessful in causing any structural change, it succeeded in persuading the legislature to once again study the proposal through the establishment of a Trial Court Commission.²⁴¹ This new commission advocated a single-tier trial court system with the ability to shift judicial resources from one county to another, but shied away from the more controversial selection question.²⁴²

Recently, advocates for consolidation of the courts turned to the Chief Justice of Indiana for relief, pursuant to section 33-2.1-7-8 of the Indiana Code.²⁴³ This statute, known as the "transfer and districting statute," provides that upon recommendation by the State Court Administrator, the supreme court may temporarily transfer trial judges to another court so long as a judge is not transferred more than forty miles from his or her county seat. This enabling legislation had remained virtually unused since it was authorized by the general assembly in 1975. However, recently the supreme court has taken action under it by creating trial court districts. The supreme court again used the statute, and the districts it created thereunder, to amend Indiana Trial Rule 79, providing that the trial courts in each district were to create their own rules for the selection of special judges.²⁴⁴ As a result, for the first time, trial judges were required to cooperate and work together in allocating their workload, albeit only in the limited occasions when the parties requested a special judge.

CONCLUSION

Having failed to secure legislative endorsement of a single-tier trial court system, proponents of unification, including the judiciary, might well be served to look internally to the supreme court for a more aggressive utilization of the "transfer and districting statute."²⁴⁵ In essence, the general assembly, while demonstrating a reluctance to embrace the single-tier trial court system, has given the supreme court the power to organize the state into administrative districts, transfer judges from one court to another within those administrative districts, and thus, allocate the judicial resources of the state to meet the present and future demands. Despite the fact that the allocation of judicial resources has traditionally been left to the general assembly, it has recognized the role and ability of the judiciary in that area. Although the supreme court was initially reluctant to make changes in the allocation of judicial resources, it now seems prepared to do so.

239. 1 INDIANA JUDGES ASS'N, *supra* note 2, at v.

240. 1 *id.* at 15-17.

241. IND. CODE §§ 33-1-15-1 to -8 (1993).

242. FINAL REPORT OF THE COMMISSION ON TRIAL COURTS, *supra* note 199, at 3.

243. IND. CODE § 33-2.1-7-8 (1993).

244. IND. TR. R. 79.

245. IND. CODE § 33.2.1-7-8 (1993).

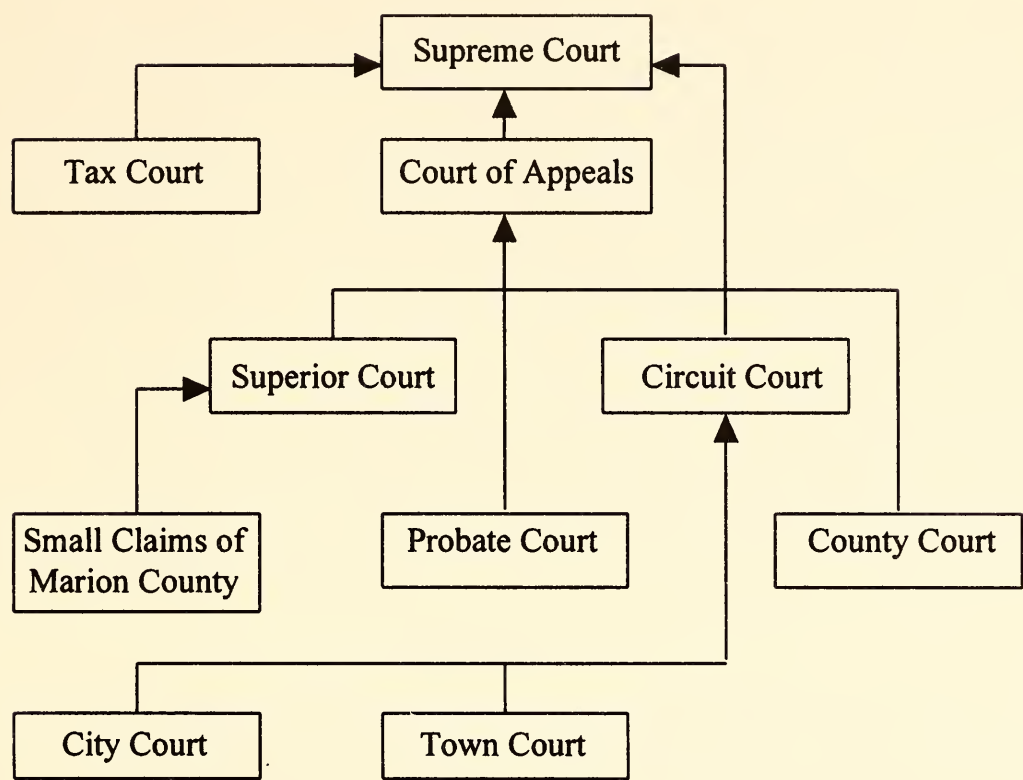
Therefore, reformers should look to the supreme court for advancing more aggressive changes.

Regarding judicial selection, the general assembly's ambivalence toward the selection process for judges has manifested itself in a hybrid method which provides for merit selection of the appellate and supreme court judges and partisan election for most trial judges. Only the general assembly can remedy this dichotomy. However, urging from bar associations and judges' groups has been inadequate to move the general assembly toward further acceptance of merit selection for more trial judges.

As Professor Leflar predicted in 1960, it will take the efforts of organizations beyond the legal community to bring about a change in the selection process for trial court judges.²⁴⁶ Leflar's prediction is correct in that reform efforts dating back to Pound in 1940 through the more recent proposals of the American Judicature Society and the American Bar Association have not been enough to move the general assembly to adopt changes. Unless more pressure is placed on the legislature from those in non-legal communities, the present hybrid of trial court organization and selection systems will remain.

246. Leflar, *supra* note 226.

APPENDIX



HISTORY AND JURISPRUDENCE OF THE PHYSICIAN-PATIENT RELATIONSHIP IN INDIANA

ELEANOR D. KINNEY*
MYRA C. SELBY**

INTRODUCTION

Common law principles have and continue to govern the physician-patient relationship, the foundation upon which health care delivery is based. A strong physician-patient relationship is essential to successful medical treatment, and sound legal rules delineating the contours of that relationship are necessary to support the development of strong physician-patient relationships.

Indiana courts have made a significant contribution in this area. In so doing, Indiana courts have well served both the patients and physicians of Indiana. In addition, Indiana court decisions have been models for the courts of other states as they address the fundamental legal issues regarding the physician-patient relationship.

This Article first reviews some important history about the health care system in Indiana. It then examines how Indiana jurisprudence regarding the physician-patient relationship has evolved since the state's early years. Finally, the Article addresses future challenges that Indiana law faces with respect to the delineation of the physician-patient relationship.

I. HISTORY

The historical context in which Indiana's jurisprudence on the physician-patient relationship evolved is instructive. It explains, in part, why the Indiana judiciary has had the opportunity to provide innovative legal analysis and guidance on the physician-patient relationship and, in particular, the problems that arise in this relationship.

Indiana has many significant accomplishments in the health care field. Specifically, the first medical society in the Northwest Territory was established in Vincennes, Indiana, prior to 1818. An early commentator noted this event:

The first medical society organized in the Northwestern Territory. . . occurred in Vincennes, Ind[iana]. The exact date is not positively known, but I know for a fact that its origin was prior to the year 1818. . . . I have evidence, obtained from a newspaper published in this town. . . . No known records of this society exist.¹

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1. G.W.H. KEMPER, A MEDICAL HISTORY OF THE STATE OF INDIANA 18-19 (1911) (internal quotations omitted).

The Sanitary Revolution and the discovery of the bacterial origin of infectious disease in the latter part of the nineteenth century² brought governmental efforts to improve public health.³ In 1881, Indiana was one of the first states to enact public health legislation and establish a state health department.⁴ It was not smooth sailing for a state agency devoted to public health in those early years. Dr. Hurty, one of the first state health officers, reported his exchange over some public health measures with a recalcitrant state legislator who closed the conversation with this remark: "I will tell you what can be done. We will get a resolution through [the legislature] to abolish the whole health business."⁵ Obviously, this prescient legislator did not foresee the future development of the health care system nor the extensive involvement of both the legislature and judiciary in the law of the "health business."

Attempts were made to establish a medical school in Indiana as early as 1839; however, they were ultimately unsuccessful.⁶ Indiana University established its school of medicine in 1903. Today, the School of Medicine, located in Indianapolis, is one of the largest in the United States and trains most of Indiana's physicians.⁷

Over the years, Indiana has also developed several leading hospitals. Wishard Memorial Hospital, Indianapolis's oldest hospital, is one of the nation's largest providers of health care services to the indigent.⁸ Other leading hospitals with national reputations abound throughout the state and have a distinguished history.⁹

Through the years, Indiana has continued its leadership in the health care sector. Even in the later development of the law governing third party payment, Indiana and its lawyers played a pivotal role. In the years after the inauguration of the Medicare¹⁰ program in 1965, Indiana hospital lawyers were leaders in challenging the Medicare cost reimbursement rules perceived to be unfair. For example, in 1979, the Indiana Hospital Association argued successfully before the Provider Reimbursement Review Board, the administrative tribunal which adjudicates Medicare payment disputes with hospitals,¹¹ that nonprofit hospitals

2. 25 ENCYCLOPAEDIA BRITANNICA 454-56 (15th ed. 1986).

3. GEORGE ROSEN, A HISTORY OF PUBLIC HEALTH 192-93 (1958).

4. Act of Mar. 7, 1881, ch. 19, 1881 Ind. Acts 37 (repealed 1949). *See* IND. CODE §§ 16-19-1-1 to -3 (1993) (establishing the state department of health); *id.* §§ 16-19-3-1 to -25 (1993 & Supp. 1996) (duties of state department of health).

5. Indiana State Department of Health, Changes in Health Care Policy 5 (1995) (unpublished paper on file with the *Indiana Law Review*). We are indebted to our colleagues at the Indiana State Department of Health for bringing this legislator's futuristic vision to our attention.

6. KEMPER, *supra* note 1, at 20-21.

7. ENCYCLOPEDIA OF INDIANAPOLIS 760 (David J. Bodenhamer et al. eds., 1994).

8. *Id.* at 1432.

9. *Id.* at 711-14, 1104, 1196, 1214-15.

10. Health Insurance for the Aged (Medicare) Act, Pub. L. No. 89-97, 79 Stat. 290 (1965) (codified as amended in scattered sections of 26 U.S.C., 42 U.S.C., and 45 U.S.C.).

11. 42 U.S.C. § 1395oo (1994).

were entitled to a return on equity capital under the old Medicare cost reimbursement rules for hospitals.¹² Eventually, the federal courts upheld the Secretary of Health and Human Services' reversal of this decision.¹³

Indiana has also provided the nation with leadership regarding reforms in the procedures for adjudicating medical malpractice cases. In 1975, under the guidance of its physician-governor, Otis R. Bowen, Indiana enacted an innovative medical malpractice statute that imposed a cap on recoverable damages and other reforms.¹⁴ Indiana's comprehensive reforms were among the first in the country to be implemented in response to increased medical malpractice claims and the escalating cost of malpractice premiums for health care providers.¹⁵ The act and its various reforms have been adopted by other states and have also been included in bills for malpractice reform at the federal level.¹⁶ Further, empirical research demonstrated that Indiana's reformed system actually provided claimants having large claims with more compensation than neighboring states which had not adopted those reforms.¹⁷

In 1980, the Indiana Supreme Court in *Johnson v. St. Vincent Hospital, Inc.*¹⁸ upheld the constitutionality of Indiana's act. This decision has been recognized by at least one prominent scholar as the appropriate analysis of the constitutionality of damage caps, screening panels, and other reforms.¹⁹ Further, after several earlier state court decisions invalidated comparable malpractice reforms, the trend among state courts has been to uphold malpractice reform statutes with damage caps and screening panels on the same grounds as the

12. PRRB Dec. No. 79-D95, Dec. 17, 1979 [1979-2 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 30,163, *aff'd in part and rev'd in part*, HCFA Admr. Dec., Feb. 15, 1980 [1980 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 30,333.

13. *Indiana Hosp. Ass'n v. Schweiker*, 544 F. Supp. 1167 (S.D. Ind. 1982), *aff'd sub nom. St. Francis Hosp. Ctr. v. Heckler*, 714 F.2d 872 (7th Cir. 1983). See generally Eleanor D. Kinney, *Medicare Payment to Hospitals for A Return on Equity Capital: The Influence of Federal Budget Policy on Judicial Decision-Making*, 11 J. CONTEMP. L. 453 (1985).

14. Act of Apr. 17, 1975, No. 146, 1975 Ind. Acts 854 (repealed 1993) (current version at IND. CODE §§ 27-12-14-1 to -5 (1993)).

15. Eleanor D. Kinney & William P. Gronfein, *Indiana's Malpractice System: No-Fault By Accident?*, 54 LAW & CONTEMP. PROBS. 169, 171 (1991).

16. See Randall R. Bovbjerg, *Legislation on Medical Malpractice: Further Developments and a Preliminary Report Card*, 22 U.C. DAVIS L. REV. 499, 521-31 (1989). See also Eleanor D. Kinney, *Malpractice Reform in the 1990s: Past Disappointments, Future Success?*, 20 J. HEALTH POL., POL'Y & L. 99, 110-19, 112-13, tbls. 1-2, app. A (1995).

17. William P. Gronfein & Eleanor D. Kinney, *Controlling Large Malpractice Claims: The Unexpected Impact of Damage Caps*, 16 J. HEALTH POL., POL'Y & L. 441, 441 (1991).

18. 404 N.E.2d 585 (1980). In *Johnson*, the court upheld the act against the challenge that the act violated article I, section 23 of the Indiana Constitution. *Id.* at 597. Since the decision in that case, the Indiana Supreme Court has changed its interpretation of that constitutional provision. *Collins v. Day*, 644 N.E.2d 72 (Ind. 1994).

19. PAUL C. WEILER, *MEDICAL MALPRACTICE ON TRIAL* 41 (1991).

Indiana Supreme Court in *St. Vincent*.²⁰

More recently, Indiana demonstrated significant leadership in its public response to the AIDS epidemic. In the early 1980s, the public school authorities in Kokomo, Indiana sought to prevent young Ryan White, who had contracted AIDS from a blood transfusion for hemophilia, from attending public school.²¹ Ryan White challenged the decision of the school authorities.²² The Clinton Circuit Court eventually upheld Ryan's right to attend public school.²³ Responding to the Ryan White controversy, the Indiana State Commissioner of Health publicly and emphatically supported Ryan White's right to attend school in light of the non-contagious nature of the AIDS (HIV) virus in a school setting.²⁴ This enlightened attitude has been demonstrated in other areas. Commentators have put Indiana ahead "of other states with its statewide services plan and network of community action groups" regarding its treatment of the AIDS epidemic.²⁵ Ultimately, Ryan White became a symbol of the AIDS tragedy in the United States. The federal legislation supporting various AIDS-related programs bears Ryan's name—the Ryan White Comprehensive AIDS Resources Emergency Act.²⁶

Indiana has also demonstrated leadership in legislation addressing complex end-of-life decisions and planning. Specifically, in 1985, Indiana enacted the Living Wills and Life-Prolonging Procedures Act.²⁷ This act permits a competent person to provide binding direction on whether to withhold life-prolonging medical procedures.²⁸ In addition, the Indiana legislature has enacted the Health Care Consent Act (HCCA),²⁹ a durable power of attorney statute that permits the appointment of health care representatives to make decisions in the event of incompetence. In so doing, Indiana was the first state to adopt the Model Health-Care Consent Act.³⁰

20. *Id.* at 42-43.

21. See Lawrence Kilman, *Nation's School Officials Seek Guidelines for Dealing with AIDS in the Classroom*, INDIANAPOLIS STAR, Aug. 4, 1985, at 22; *AIDS Ruling Defied*, CHI. TRIB., Dec. 19, 1985, at 3; *Court Rulings in Other AIDS Cases*, L.A. TIMES, Sept. 9, 1987, at 6.

22. Kilman, *supra* note 21, at 22.

23. *Teenage AIDS Victim Back in Class After Indiana Judge Lifts Injunction*, ATLANTA J. & CONST., Apr. 10, 1986, at A02.

24. See Kilman, *supra* note 21, at 22.

25. *Glare of Media Dogs 14-Year-Old AIDS Victim*, THE OTTAWA CITIZEN, Sept. 2, 1986, at B16.

26. Pub. L. No. 101-381, 104 Stat. 576 (1990) (codified in scattered sections of 42 U.S.C.).

27. IND. CODE §§ 16-36-4-1 to -13 (1993 & Supp. 1996). See Carol A. Mooney, *Indiana's Living Wills and Life-Prolonging Procedures Act: A Reform Proposal*, 20 IND. L. REV. 539 (1987).

28. IND. CODE § 16-36-4-8 (1993).

29. IND. CODE §§ 16-36-1-1 to -14 (1993). See generally William H. Thompson, *Indiana's New Health Care Consent Act: A Guiding Light for the Health Care Provider*, 21 IND. L. REV. 181 (1988); Linda S. Whitton, *Health Care Advance Directives: The Next Generation*, RES GESTAE, June 1995, at 18.

30. MODEL HEALTH-CARE CONSENT ACT, 9 U.L.A. 453-77 (1988).

In sum, Indiana has a long and distinguished history of accomplishment in health law. The Indiana health care agencies, professionals, and institutions, as well as their attorneys have a tradition of innovation, leadership and excellence. It is no wonder that the Indiana judiciary has responded with similar leadership in tackling the important legal issues facing the health care system today.

II. THREE EXEMPLARY CASES

The authors have selected three cases which demonstrate the important tradition of the Indiana judiciary in defining the physician-patient relationship and the contours of that relationship. The first case, *Hurley v. Eddingfield*,³¹ dates from the turn of the century and defines the nature of the physician-patient relationship. The second case, *Culbertson v. Mernitz*,³² addresses physician liability based on the failure to adequately inform the patient about treatment or procedure.³³ More specifically, it addresses Indiana's physician-based standard of informed consent. The third case, *In re Lawrance*,³⁴ involves a difficult challenge to the physician-patient relationship brought about by the life-extending technologies of modern medicine.

A. Defining the Physician-Patient Relationship

In *Hurley v. Eddingfield*,³⁵ the Indiana Supreme Court issued a landmark decision which established that the physician-patient relationship is based on contract. The 1901 opinion, written by Judge Baker just three years before his departure for the U.S. Court of Appeals for the Seventh Circuit, defined the contract as one into which both the physician and patient voluntarily enter.

The facts are straightforward.³⁶ On July 6, 1899, Thomas Burk sought the services of Dr. Eddingfield, a duly licensed physician practicing in Montgomery County as well as the Burk's family physician, to attend Mr. Burk's wife, Charlotte Burk, in the delivery of their child. Although Dr. Eddingfield had no other pressing matters and there were no other available physicians, he refused to assist Mrs. Burk. Charlotte Burk and her baby died due to complications during

31. 59 N.E. 1058 (Ind. 1901).

32. 602 N.E.2d 98 (Ind. 1992).

33. Another body of law beyond the scope of this Article dealing with the physician-patient relationship gone awry is the law of fraudulent concealment. See, e.g., *Hughes v. Glaese*, 659 N.E.2d 516 (Ind. 1995); *Guy v. Schuldt*, 138 N.E.2d 891 (Ind. 1956); *Follett v. Davis*, 636 N.E.2d 1282 (Ind. Ct. App. 1994); *Weinberg v. Bess*, 638 N.E.2d 841 (Ind. Ct. App. 1994); *Adams v. Luros*, 406 N.E.2d 1199 (Ind. Ct. App. 1980); see also John C. Render, *Health Care Law, 1994 Survey of Recent Developments in Indiana Law*, 28 IND. L. REV. 959, 960-62 (1995).

34. 579 N.E.2d 32 (Ind. 1991).

35. 59 N.E. 1058 (Ind. 1901).

36. Brief for Appellant, *Hurley v. Eddingfield*, 59 N.E. 1058 (Ind. 1901). See RAND E. ROSENBLATT ET AL., *LAW AND THE AMERICAN HEALTH CARE SYSTEM* 48 (1997). We are indebted to Rand E. Rosenblatt, Professor of Law at the School of Law, Rutgers University of New Jersey, Camden, for bringing this brief to our attention.

the birth process.

Mrs. Burk's estate sued Dr. Eddingfield for \$10,000 in damages for the wrongful death of Mrs. Burk.³⁷ The court sustained Dr. Eddingfield's demurrer to the complaint.³⁸ Judge Baker affirmed the Montgomery Circuit Court in a clear, brief, and controversial opinion.³⁹

The issue, Judge Baker contended, was the defendant's "refusal to enter into a contract of employment."⁴⁰ Judge Baker also explored the implications of state licensure on a doctor's obligations toward those in need of medical care and concluded: "In obtaining the State's license (permission) to practice medicine, the State does not require, and the licensee does not engage, that he will practice at all or on other terms than he may choose to accept."⁴¹

Judge Baker's decision has generated considerable commentary over the years, including articles in notable law reviews,⁴² and it is also included in leading health law textbooks.⁴³ One well-known commentator on the law of medical malpractice illuminates the *Hurley* case's national prominence and reiterates its importance in delineating the law of the physician-patient relationship:

The classic case in this area is *Hurley v. Eddingfield*, decided in 1901 by the Supreme Court of Indiana. . . . [T]he court pointed out that the physician-patient contractual relationship is one depending on assent of both parties and that a license to practice medicine does not compel a physician to contract against his will. [Doctors have] the right to refuse to see [a] patient and [are] not therefore liable for the patient's death.⁴⁴

This case does represent a seemingly stark and harsh statement of a physician's obligation to a potential patient. It seems especially harsh given its support of the elective nature of the physician-patient relationship, especially in emergency situations. Yet the law does impose considerable obligations on physicians once the physician-patient relationship commences. It seems only fair that physicians have control over whether they enter that relationship with all of its attendant obligations. Perhaps ethics rather than law is the better instrument to define the physician's moral obligation toward individuals in need of medical treatment. It is noteworthy that the American Medical Association's Code of

37. *Hurley*, 59 N.E. at 1058.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. See, e.g., Melvin A. Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 755 & n.45 (1982); Leonard S. Powers, *Hospital Emergency Service and the Open Door*, 66 MICH. L. REV. 1455, 1480 & n.95 (1968); Rand E. Rosenblatt, *Health Care Reform and Administrative Law: A Structural Approach*, 88 YALE L.J. 243, 248 & n.13 (1978); Graham Hughes, *Criminal Omissions*, 67 YALE L.J. 590, 632 & n.148 (1957).

43. See, e.g., GEORGE J. ANNAS ET AL., AMERICAN HEALTH LAW 45 (1990); WALTER WADLINGTON ET AL., LAW AND MEDICINE 102, 322, 363 (1980).

44. ANGELA RODDEY HOLDER, MEDICAL MALPRACTICE LAW 7 (1975).

Ethics enunciates a similar vision of the contractual nature of the physician-patient relationship from a legal perspective, but imposes additional obligations on physicians in that relationship as a matter of professional ethics.⁴⁵

*B. The Physician-Patient Relationship Gone Awry—
Informed Consent in Medical Liability Cases*

The physician-patient relationship, while contractual in nature, also has associated duties in tort. Specifically, there is the general duty of care under the law of negligence. The *Restatement (Second) of Torts* defines negligence as "conduct which falls below the standard of care established by law for the protection of others against unreasonable risk of harm."⁴⁶

In addition, the law of negligence imposes an additional duty on physicians to accord their patients sufficient information about proposed medical treatments to enable patients to give informed consent.⁴⁷ The doctrine was first articulated by Justice Cardozo and was based on his observation that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body."⁴⁸ The doctrine of informed consent arises from the patient's right of self-determination.⁴⁹ It requires physicians to provide information to the patient on the nature and the purpose of the procedure or treatment as well as its risks and alternatives.⁵⁰

Indiana adopted the physician-based standard of informed consent in *Culbertson v. Mernitz*.⁵¹ Justice Krahulik wrote the notable opinion ninety-one years after *Hurley v. Eddingfield*.

Patty Jo Culbertson consulted Dr. Mernitz for some troubling gynecological problems. Dr. Mernitz recommended and performed two surgical procedures. Unsatisfied with the results and treatment, Mrs. Culbertson sought another physician's care. Ultimately, according to Mrs. Culbertson, she had to undergo a complete hysterectomy as a result of the two procedures that Dr. Mernitz had performed.

Mrs. Culbertson sued Dr. Mernitz on several medical malpractice theories,

45. COUNCIL OF ETHICAL & JUD. AFFAIRS, AMA, CODE OF MEDICAL ETHICS §§ 9.06, 9.12 (1996-97 ed.).

46. RESTATEMENT (SECOND) OF TORTS § 282 (1977).

47. BARRY R. FURROW ET AL., HEALTH LAW §§ 6-9 to 6-18 (1995). See generally RUTH R. FADEN & TOM L. BEAUCHAMP, A HISTORY AND THEORY OF INFORMED CONSENT (1986).

48. *Schloendorff v. Society of N.Y. Hosp.*, 105 N.E. 92, 93 (1914).

49. FADEN & BEAUCHAMP, *supra* note 47, at 9, 33; FURROW, *supra* note 47, § 6-9; 1 PRESIDENT'S COMM'N FOR THE STUDY OF ETHICAL PROBS. IN MED. & BIOMED. & BEHAV. RES., MAKING HEALTH CARE DECISIONS 2-4 (1982); Marjorie Maguire Shultz, *From Informed Consent to Patient Choice: A New Protected Interest*, 95 YALE L.J. 219, 220 & n.13 (1985).

50. FADEN & BEAUCHAMP, *supra* note 47, at 252. See COUNCIL OF ETHICAL & JUD. AFFAIRS, AMA, CODE OF MEDICAL ETHICS § 8.08 (1994 ed.); Anthony Szczygiel, *Beyond Informed Consent*, 21 OHIO N.U. L. REV. 171, 184 (1994).

51. 602 N.E.2d 98 (Ind. 1992).

including informed consent.⁵² She asserted that Dr. Mernitz “failed to inform her of the alternatives to the surgery and the inherent risks and complications of the surgery.”⁵³ She proceeded through the medical review panel, as required by Indiana’s medical malpractice statute,⁵⁴ without success.⁵⁵ The Fulton Circuit Court granted summary judgment for the defendant on all claims.⁵⁶ The Indiana Court of Appeals reversed in part,⁵⁷ because it determined that a lack of informed consent claim did not require expert medical testimony.⁵⁸

On transfer, the Indiana Supreme Court held that “except in those cases where deviation from the standard of care is a matter commonly known by lay persons, expert medical testimony is necessary to establish whether a physician has or has not complied with the standard of a reasonably prudent physician.”⁵⁹ In this holding, the Indiana Supreme Court clearly adopts a physician-based standard for determining informed consent.

But the court was by no means united in its decision. Justice Krahulik was joined by Chief Justice Shepard and Justice Givan. Justice Dickson wrote a spirited dissent which Justice DeBruler joined.

The doctrine of informed consent has generated considerable debate, and *Culbertson* reflects that debate. The reason for the debate is the doctrine’s troubling nature. Liability based on informed consent is often imposed even when liability based on negligent performance of the medical care in question is not warranted. From the physician’s perspective, liability is based on factors, such as the outcome of future events, beyond the control of the physician. The patient, on the other hand, lives with a bad result that might have been avoided had the physician provided better information on which to base decisions about medical treatment. But then, the physician counters, will a patient, in retrospect, ever have had enough information if the outcome is bad.

It is no surprise that state courts over the years have adopted two approaches to determining whether patients have given informed consent. One approach is a physician-oriented standard that focuses on what a prudent physician would have done in like or similar circumstances regarding advising the patient about a risk inherent in a proposed procedure.⁶⁰ The second approach is a patient-oriented standard that focuses on what a prudent patient would have needed to know regarding a given risk.⁶¹

Operationally, the different standards impose different requirements for the requisite expert testimony to establish informed consent. With the prudent

52. *Id.* at 99.

53. *Id.*

54. IND. CODE § 27-12-8-4 (1993).

55. *Culbertson*, 602 N.E. 2d at 99.

56. *Id.*

57. *Id.* (citing *Culbertson v. Mernitz*, 591 N.E.2d 1040, 1042 (Ind. Ct. App. 1992)).

58. *Id.* at 99-100.

59. *Id.* at 104.

60. FURROW, *supra* note 47, § 6-10(b).

61. *Id.* § 6-10(a).

physician standard, expert testimony is required to establish what a reasonable physician would have done in similar circumstances.⁶² In the prudent patient standard, beginning with the seminal cases of *Cobbs v. Grant*⁶³ and *Canterbury v. Spence*,⁶⁴ the plaintiff need not introduce expert testimony once the existence of the risk is established, and the jury can determine if adequate information was given for informed consent.⁶⁵

It is with this understanding of the problematic nature of the informed consent doctrine, that one comes to appreciate both the majority and dissenting opinions in *Culbertson v. Mernitz*.

In the majority opinion, Justice Krahulik comes down on the side of the physician and requires the plaintiff to present expert testimony on what information a reasonably prudent physician would have offered in the same situation. Justice Krahulik reiterates that this standard was well established in Indiana and other jurisdictions prior to the early 1970s when "two cases on the opposite coasts carved out an additional exception to the requirement of expert medical testimony in the area of 'informed consent'"—*Cobbs v. Grant* and *Canterbury v. Spence*.⁶⁶

After reviewing informed consent in Indiana jurisprudence,⁶⁷ Justice Krahulik offers a perspective on the practical problem of the physician in the informed consent situation:

From a physician's viewpoint, he should not be called upon to be a "mind reader" with the ability to peer into the brain of a prudent patient to determine what such patient "needs to know," but should simply be called upon to discuss medical facts and recommendations with the patient as a reasonably prudent physician would.⁶⁸

Justice Krahulik, not unmindful of the patient's important interest in self-determination, comments further: "the physician should be required to give the patient sufficient information to enable the patient to reasonably exercise the patient's right of self-decision in a knowledgeable manner."⁶⁹ Further, he observes, that patients do not want the medical profession "to determine in a paternalistic manner what the patient should or should not be told concerning the course of treatment."⁷⁰

Justice Krahulik also recognized that the medical profession's own ethical standards on informed consent had become more sensitive to the importance of patient autonomy in decision-making about medical care. He quotes the standard

62. *Id.* § 6-10(b).

63. 502 P.2d 1 (Cal. 1972).

64. 464 F.2d 772 (D.C. Cir. 1972).

65. FURROW, *supra* note 47, § 6-10(a).

66. *Culbertson*, 602 N.E.2d at 100.

67. *Id.* at 101-04.

68. *Id.* at 103.

69. *Id.* at 104.

70. *Id.*

on informed consent from the *1992 Code of Medical Ethics Current Opinions* prepared by the Council on Ethical and Judicial Affairs of the American Medical Association: "The patient's right of self-decision can be effectively exercised only if the patient possesses enough information to enable an intelligent choice."⁷¹ This standard goes on to state the physician's obligation to "present the medical facts accurately" and to "make recommendations for management in accordance with good medical practice."⁷² The standard also recognizes that reasonable patients "should not be expected to act uniformly, even under similar circumstances, in agreeing to or refusing treatment."⁷³

In his thoughtful dissent, Justice Dickson comes down on the side of the patient.⁷⁴ He places great emphasis on the value of patient autonomy as paramount in resolving the informed consent dilemma. He recalls that the court's decision in the case, *In re Lawrance*, had recognized "a commitment to patient self-determination."⁷⁵ He goes on to assert that "informed consent is a requisite component of the doctor-patient relationship, attributable in part to the relative lack of parity in that relationship."⁷⁶

Justice Dickson recognizes that the real nub of the informed consent dilemma and the basis of the conflict between prevailing standards is the "disagreement concerning the role of expert witnesses in determining whether the informed consent of the patient has been obtained."⁷⁷ With respect to the nature of testimony needed, Justice Dickson nicely states the applicable rule for the prudent patient standard: "while medical expertise would be required to identify the risks of the proposed treatment and non-treatment, the fact finder needs no expert guidance to determine the materiality of a particular risk to a patient."⁷⁸ Justice Dickson then lays out the contours of material risk, quoting extensively from *Canterbury v. Spence*.⁷⁹

Further, Justice Dickson rejects the majority's view that the relevant ethical commands of the medical profession adequately address the problem of informed consent. Specifically, Justice Dickson maintains that the AMA standard did not articulate useful parameters to guide physicians on the extent to which risks must be disclosed to patients.⁸⁰ However, he points out that this deficiency is "understandable" because the extent of disclosure is really a "non-medical

71. *Id.* at 103-04 (quoting COUNCIL ON ETHICAL & JUD. AFFAIRS, AMA, 1992 CODE OF MEDICAL ETHICS CURRENT OPINIONS (1992)).

72. *Id.*

73. *Id.*

74. *Id.* at 104 (Dickson, J., dissenting).

75. 579 N.E.2d 32 (Ind. 1991).

76. *Culbertson*, 602 N.E.2d at 105 (Dickson, J., dissenting) (citing *Cobbs v. Grant*, 502 P.2d 1, 9 (Cal. 1972)).

77. *Id.* at 105.

78. *Id.*

79. *Id.* at 105-06.

80. *Id.* at 106.

determination.”⁸¹ Justice Dickson concludes: “It is only from the perspective of the ordinary person that a fact-finder can realistically determine how much information is ‘enough’ for the ordinary reasonable patient to make an informed decision.”⁸²

Justice Dickson is not unmindful of the dilemma the informed consent situation placed on physicians in requiring a physician “to speculate as to what a hypothetical reasonable patient would ‘need to know.’” However, he is also concerned about “bias” and “protective self-interest” with the prudent physician standard⁸³ and concludes: “Sympathy for such a physician plight, however, is eclipsed by the fundamental value of patient autonomy and self-determination.”⁸⁴

The *Culbertson* case presents two opinions that articulate the two prevailing positions on the highly troublesome informed consent doctrine in an especially skillful and accurate manner. On the one hand—the majority tips the balance in favor of the physician. On the other hand—the dissent would tip the balance in favor of the patient.

Conscientious courts endeavor to avoid dissents and speak with one voice. But dissents are wonderful from the perspective of the law teacher for they show students the essential character of the law. Namely, at its heart and core, the law is rhetoric to be plied by lawyers who make it work for the resolution of their clients’ problems—day-by-day, case-by-case. Inevitably, there are always more than two sides to any legal issue.

But only academic lawyers have the luxury of vacillating from side to side on important legal questions. Courts must pick a position and decide—even when the issues are not straightforward and the consequences for the losing party unfortunate. In those opportunities when the Indiana Supreme Court has been asked to take a position and decide questions in delineating the physician-patient relationship, it has done so with wisdom and sensitivity and has achieved justice.

C. The Physician-Patient Relationship Faces New Challenges

Both *Hurley* and *Culbertson* teach that the physician-patient relationship is one which includes certain duties and obligations on the part of the physician toward the patient. Perhaps the most significant of these duties is that of informing the patient of the risks involved in a proposed medical treatment or procedure so that the patient can reach an informed decision about consenting to that treatment or procedure.

Frequently, however, physicians and other health care providers must treat individuals who lack the capacity to consent. For example, patients who suffer an injury rendering them unconscious cannot consent to treatment. To deal with such situations, various forms of constructive or substituted consent have emerged in

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

the law.⁸⁵ This substituted consent generally allows a surrogate to make medical decisions on behalf of the patient.⁸⁶

In the landmark decision *In re Lawrance*,⁸⁷ the Indiana Supreme Court addressed a special form of constructive consent—surrogate decision-making by the parents and siblings of an individual who was never competent to give consent.⁸⁸ The opinion, written by Chief Justice Shepard, examines the propriety of surrogate decision-making when the decision will most likely result in the patient's death. *Lawrance* is significant in Indiana health law jurisprudence, because, at the time the court heard the case, it was unclear whether artificially-provided nutrition and hydration constituted medical treatment. It was also unclear whether such treatment could be withdrawn based on the consent of parents as surrogate decision-makers.⁸⁹ Also, as discussed below, this decision has been important for other state courts in delineating sound rules to address these issues.⁹⁰

Sue Ann Lawrance, born in 1949, grew normally from birth until age nine when she began to show symptoms of intracranial pressure. Sue Ann underwent a craniotomy, a procedure intended to relieve the pressure on her brain.⁹¹ After undergoing this procedure, Sue Ann suffered permanent brain damage. She was, however, still functional to some degree. Throughout the rest of her childhood and adolescence, she attended special schools and camps for the handicapped. Her condition deteriorated over time.

In 1987, at thirty-eight years of age, Sue Ann fell while attending a camp for the disabled and suffered a subdural hematoma. She underwent a second craniotomy. On July 24, 1987, she entered the Manor House nursing home in Noblesville, Indiana, and she remained in a persistent vegetative state until her death on July 18, 1991. She was forty-two years old at the time of her death.

Before Sue Ann Lawrance died, her condition had deteriorated to the point that she could no longer receive food or water orally. To provide her with sustenance, Sue Ann's caretakers inserted tubes into her stomach to deliver nutrition and hydration. Her doctors predicted that she would remain in this state indefinitely. On March 4, 1991, her parents petitioned the court for permission to

85. FURROW, *supra* note 47, § 17-16.

86. *Id.*

87. 579 N.E.2d 32 (Ind. 1991).

88. See FURROW, *supra* note 47, § 17-31 for a general discussion regarding never-competent individuals.

89. Vaneeta M. Kumar & Eleanor D. Kinney, *Indiana Lawmakers Face National Health Policy Issues*, 25 IND. L. REV. 1271, 1272 (1992).

90. See Susan Busby-Mott, *The Trend Towards Enlightenment: Health Care Decisionmaking in Lawrance and Doe*, 25 CONN. L. REV. 1159 (1993); Edward O'Brien, Note, *Refusing Life-Sustaining Treatment: Can We Just Say No?*, 67 NOTRE DAME L. REV. 679 (1992); Recent Case, 105 HARV. L. REV. 1426 (1992).

91. *Lawrance*, 579 N.E.2d at 35. Although the case does not specifically state it, considering their daughter's minor status, it was most likely Sue Ann's parents who consented to the craniotomy.

withdraw their daughter's artificially provided nutrition and hydration.⁹² She died of natural causes before the petition wended its way through the courts.⁹³

However, after her death, despite the mootness of the case, the Indiana Supreme Court decided to issue an opinion. The court found that the case involved a question of "great public interest,"⁹⁴ a well-carved out exception to the mootness doctrine. The court also stated: "[I]rrespective of the death of the patient in this litigation, many Indiana citizens, health care professionals, and health care institutions expect to face the same legal questions in the future."⁹⁵ Indiana's approach, which gives great deference to the family's interest in making informed medical treatment choices without state intervention, is consistent with positions advocated by various commentators in this area.⁹⁶

The court addressed two issues of significance to surrogate decision-makers, physicians, and health care treatment facilities. First, the court examined the issue of whether Indiana's Health Care Consent Act (HCCA) applies where the family of a never-competent patient in a persistent vegetative state seeks to withdraw artificially provided nutrition and hydration.⁹⁷ The HCCA⁹⁸ permitted individuals authorized to make medical treatment decisions for another—surrogate decision-makers—"to provide, withdraw, or withhold medical care necessary to prolong life."⁹⁹ The act clearly accorded a surrogate decision-maker the right to withdraw medical care. Therefore, the resolution of the case turned on whether artificially provided nutrition and hydration, i.e., food and water delivered directly to the patient's stomach through tubes, constituted "medical treatment" within the meaning of the HCCA.¹⁰⁰

The HCCA did provide some guidance on this question. The court determined that the act, by virtue of its definition of "health care," applied to "health care" decisions.¹⁰¹ Specifically, the HCCA defined "health care" as "any care, treatment, service, or procedure to maintain, diagnose, or treat an individual's

92. *Id.* The petition was filed in Hamilton Superior Court No. 2.

93. *Id.* at 36.

94. *Id.* at 37.

95. *Id.*

96. *See, e.g., The Saikewicz Decision, Judges As Physicians*, 298 NEW ENG. J. MED. 508 (1978) (arguing that the court should not involve itself in private decisions between families of incompetent patients and their physicians); Task Force on Ethics of the Society of Critical Care Medicine, *Consensus Report on Ethics of Foregoing Life-Sustaining Treatments in the Critically Ill*, 18 CRITICAL CARE MED. 1435-39 (1990) (arguing that judicial intervention should be a last resort).

97. *Lawrance*, 579 N.E.2d at 38-41.

98. Act of Apr. 30, 1987, No. 207, 1987 Ind. Acts 2340 (codified as amended at IND. CODE §§ 16-8-12-1 to -13 (1988 & Supp. 1992) (repealed 1993) (current version at IND. CODE §§ 16-36-1-1 to -14 (1993))).

99. IND. CODE. § 16-8-12-11(a) (Supp. 1992) (repealed 1993).

100. *See* Kathleen M. Anderson, Note, *A Medical-Legal Dilemma: When Can "Inappropriate" Nutrition and Hydration Be Removed in Indiana?*, 67 IND. L.J. 479, 500 (1992).

101. *Lawrance*, 579 N.E.2d at 40.

physical or mental condition.”¹⁰² However, the HCCA itself did not address the question of whether artificial nutrition and hydration was a “treatment” under the act. If it did, the plain language of the HCCA would permit a surrogate decision-maker to consent to the withdrawal of artificial nutrition and hydration.

The court, looking to the Indiana medical community, Indiana statutory law and courts in other jurisdictions, concluded that there was no substantial difference between artificial nutrition and hydration and any other medical treatment.¹⁰³ Interestingly, this conclusion is consistent with other positions advanced by the Hastings Center¹⁰⁴ and the American Medical Association.¹⁰⁵

The court reiterated Indiana’s commitment to a patient’s right of self-determination regarding decision-making in medical situations.¹⁰⁶ The right to consent to a course of treatment, the court determined, necessarily includes the right to refuse a course of treatment.¹⁰⁷

The court noted that a patient’s autonomy does not end when the patient becomes incompetent, but rather the power to make decisions about health care shifts to the family.¹⁰⁸ The court concluded that “artificial nutrition and hydration is treatment that a competent patient can accept or refuse, that the family of an incompetent patient can accept or refuse it on behalf of the patient, and that the procedures of the HCCA apply to such decisions.”¹⁰⁹

The court next addressed the question of whether court proceedings were necessary to implement the surrogate’s decision to withdraw nutrition and hydration.¹¹⁰ The court found that the HCCA was designed to avoid court proceedings, and that with such a design, the legislature had signaled its clear intent to favor the decision of family-member surrogates over decisions arrived at through judicial intervention.¹¹¹ The court wrote that the court system should “become involved only when no one is available to make decisions for a patient or when there are disagreements.”¹¹² The court concluded that court proceedings were not necessary for the Lawrance family to make health care decisions for their

102. *Id.* at 38.

103. *Id.*

104. *See* THE HASTINGS CENTER, GUIDELINES ON THE TERMINATION OF LIFE-SUSTAINING TREATMENT AND THE CARE OF THE DYING 59 (1987) (concluding that standards for withdrawal of artificial nutrition and hydration are essentially the same as other forms of medical treatment).

105. *See* COUNCIL OF ETHICAL AND JUD. AFFAIRS, AMA, CODE OF MEDICAL ETHICS § 2.20 (1996-97 ed.) (concluding that patient autonomy includes the decision to forgo life-sustaining treatment which may include artificial nutrition and hydration, and if the patient is not competent to make this decision a surrogate may make the decision for the incompetent patient).

106. *Lawrance*, 579 N.E.2d at 38-39 (citing the Indiana Constitution, the common law, and several statutes in support of its decision).

107. *Id.* at 39.

108. *Id.*

109. *Id.* at 41.

110. *Id.* at 41-44.

111. *Id.* at 41-42.

112. *Id.* at 42.

daughter, and that, in the future, health care providers could rely on the decision of surrogate decision-makers to withdraw life sustaining treatment in similar circumstances.¹¹³

Through *Lawrance*, Indiana adopted the family-based model of decision-making for incompetent patients who have left no or inadequate advance directives.¹¹⁴ This model allows the family of a never-competent patient to make treatment choices with the assistance of a family physician without the need for judicial intervention.¹¹⁵ It is also important to note that the court dismissed the emergency guardianship statute as inapplicable to this case.¹¹⁶ The court asserted that the legislature did not intend to permit strangers to litigate family decisions.¹¹⁷ In so doing, the court reiterated its support for the private nature of medical decisions which should be made between the physician and the incompetent patient's family. This excludes uninterested (in a legal sense) third parties and the court system from intruding unnecessarily into the private decisions of Indiana's citizens.

The articulation of the family-based decision-making model in *Lawrance* has received some acclaim. Specifically, one commentator observed that: "[T]he Indiana Supreme Court reclaimed the power of surrogates to make decisions for incompetent patients, setting an example for other states to follow."¹¹⁸ The case has been touted, not only for its determination that artificial treatment and hydration is a medical treatment which can be removed,¹¹⁹ but also for its clear support of private medical decision-making.¹²⁰

Yet the *Lawrance* decision has not been without criticism.¹²¹ The major thrust of these critiques is a failure to delineate guidance for families in making decisions. Chief Justice Shepard has responded to this criticism:

The students who edit the Harvard Law Review thought we had failed in our duty to our citizens. I am not persuaded that families need much guidance from judges on these questions or that a court which purports to provide such guidance won't only embroil families in difficult litigation. Surrounded as they are by legions of legal entanglements already, families would do best to consult their own hearts and consciences. The nation has thrived as families have done that over the generations, and it will probably be the surest path for the years ahead.¹²²

113. *Id.* at 43.

114. See Busby-Mott, *supra* note 90, at 1175-76, for a discussion of the Family-Based Decision Making Model.

115. *Id.* at 1175.

116. *Lawrance*, 579 N.E.2d at 43-44.

117. *Id.* at 44.

118. Busby-Mott, *supra* note 90, at 1222.

119. *Id.* at 1213; Anderson, *supra* note 100, at 494.

120. Busby-Mott, *supra* note 90, at 1225; Kumar & Kinney, *supra* note 89, at 1276.

121. See generally O'Brien, *supra* note 90; Recent Case, *supra* note 90.

122. Randall T. Shepard, *Family Decisionmaking and Forgoing Treatment: A Judicial*

What does the case mean to physicians and patients in Indiana? It is clear after the *Lawrance* opinion that the Health Care Consent Act permits the surrogate decision-maker broad authority to decide to withdraw extraordinary artificial means used to sustain life when there is no reasonable hope of recovery from a persistent vegetative state. The *Lawrance* decision also serves as a guide to other states adopting the Uniform Health-Care Consent Act and generally as an attempt to resolve questions of surrogate decision-making.

CONCLUSION

The physician-patient relationship has faced tremendous challenges since the turn of the century and the historic case of *Hurley v. Eddingfield*. Modern medical science has developed highly successful treatments for illness as well as life prolonging technologies. Because of the high cost of these treatments and technologies, public and private health insurance has, with all the attendant efforts of third parties to constrain the escalating cost of medical care, impinged on, although not attenuated, the essential therapeutic relationship between physician and patient. Further, the physician-patient relationship has been challenged by expanded tort liability rules, primarily from the 1960s forward, that impose greater accountability on physicians in their relationships with patients.

The twenty-first century will undoubtedly see increasing challenges for the physician-patient relationship. State courts, including Indiana's, must be ready to assist physicians, patients and the other major players in the health care system in delineating appropriate legal rules to meet these challenges and in defining the new dimensions of the relationship in a sound and just manner.

INDIANA AS A FORERUNNER IN THE JUVENILE COURT MOVEMENT

FRANK SULLIVAN, JR. *

INTRODUCTION

One of the nation's first juvenile courts was established in Indianapolis in 1903. In this Article, I will review the historical context in which juvenile courts were created in Indiana, the very interesting story of their authorization by the 1903 general assembly, the way in which the new court operated in Indianapolis, and the national recognition the new court received.

I. HISTORICAL CONTEXT

At the end of the 19th century, this country's courts treated children accused of crimes the same as adult offenders. They were tried in courts of general criminal jurisdiction with all the formalities of the criminal law and its constitutional safeguards.¹ If convicted, they were incarcerated in adult jails and prisons.² Like the rest of the country, Indiana made no distinction between the adult and the child. Indiana made no special provision for separate confinement for children pending trial, the hearing of their cases, or their final disposition. If guilty, children might share incarceration with men and women in jail or a workhouse. In more serious cases, they might be transferred to the criminal court or be sentenced to the Indiana Boys' School or the Industrial School for Girls.³

This system brought scrutiny from reformers, most notably in Chicago, who believed that children should not be held as accountable as adult offenders.⁴ Rather than subject children to the punitive, adversarial, and formalized trappings of the adult criminal process, the reformers envisioned a system that would treat and rehabilitate a child based on an individualized evaluation of each youth's

* Justice, Indiana Supreme Court. J.D., 1982, Indiana University School of Law—Bloomington; A.B., 1972, Dartmouth College. I want to express my appreciation to the many people who assisted me on this project, especially F. Gerald Handfield, State Archivist; Robert Horton, Archivist, Indiana State Archives; John Newman, former State Archivist and Director, Records Management Section, Supreme Court Division of State Court Administration; and the staff of the Indiana Division, Indiana State Library.

1. HERBERT H. LOU, JUVENILE COURTS IN THE UNITED STATES 19 (1927); Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 106 (1909).

2. For example, a special committee of the Chicago Bar Association found that 575 children between the ages of ten and sixteen were confined in the city jail and that 1983 boys were committed to the city prison during the twenty months ending November 1, 1898. LOU, *supra* note 1, at 20-21 (citing T.D. HURLEY, ORIGIN OF THE ILLINOIS JUVENILE COURT LAW 12).

3. JUVENILE COURT OF MARION COUNTY, 1903-1905 REPORT 1, 5 (1905) [hereinafter 1903-1905 REPORT].

4. Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1223-24 & n.181 (1970) (citing COMMITTEE ON JUVENILE COURTS, REPORT TO THE CHICAGO BAR ASSOCIATION (1899)).

special circumstances.⁵

The reformers did not have to look far to find both a philosophy and a structure for dealing more humanely with juvenile crime. The doctrine of *parens patriae*⁶ had already been invoked to justify vigorous state intervention on behalf of dependent children⁷ and neglected children.⁸

Indiana provides a particularly good example. In 1889 and 1891, the general assembly passed, then amended, respectively, the Board of Children's Guardians Act, establishing in the state's largest counties a board of citizens to be appointed by the circuit judge. This board was charged with "the care and supervision of neglected and dependent children under fifteen years of age. . . ." Under the new act, the board was authorized to bring an action in circuit court for the custody of any child the board had probable cause to believe was abandoned, neglected or cruelly treated by its parents.¹⁰ The court was authorized to award custody to the

5. NATIONAL ADVISORY COMM. ON CRIMINAL JUSTICE STANDARDS AND GOALS, JUVENILE JUSTICE AND DELINQUENCY PREVENTION 6 (1976). *But see* Fox, *supra* note 4, at 1229-30 (arguing that the juvenile court movement "changed nothing of substance" and served private sectarian interests rather than the public good).

6. *Parens patriae* literally means "parent of the country" and refers to the traditional role of the state as sovereign and guardian of persons under legal disability. BLACK'S LAW DICTIONARY 1114 (6th ed. 1990). *Parens patriae* originates from the English common law where the King had a royal prerogative to act as guardian for persons under a legal disability such as infants and those mentally ill. In the United States, the *parens patriae* function belongs with the states. *Id.*

7. The early juvenile court statutes defined "dependent child" as a boy under the age of sixteen or girl under the age of seventeen "who is dependent upon the public for support, or who is destitute, homeless or abandoned. . . ." Illinois Juvenile Court Act § 1, 1899 Ill. Laws 131, 131 (repealed 1965) (current version at 705 ILL. COMP. STAT. 405/2-4 (West 1992 & Supp. 1996)); Indiana Juvenile Court Act, ch. 41, § 1, 1907 Ind. Acts 59, 59 (repealed 1974) (current version at IND. CODE §§ 31-6-4-3, -3.1 (Supp. 1996) (child in need of services)).

8. The early juvenile court statutes defined "neglected child" as a boy under the age of sixteen or girl under the age of seventeen "who has not had proper parental care or guardianship; or who habitually begs or receives alms; or who is found living in any house of ill-fame or with any vicious or disreputable person; or who is employed in any saloon; or whose home by reason of neglect, cruelty or depravity on the part of its parents, guardian or other person in whose care it may be, is an unfit place for such child; or whose environment is such as to warrant the state, in the interest of the child, in assuming its guardianship." Illinois Juvenile Court Act § 1, 1899 Ill. Laws 131, 131 (repealed 1965) (current version at 705 ILL. COMP. STAT. 405/2-3 (West 1992 & Supp. 1996)); Indiana Juvenile Court Act, ch. 41, § 2, 1907 Ind. Acts 59, 60 (repealed 1974) (current version at IND. CODE §§ 31-6-4-3, -3.1 (Supp. 1996)).

9. Board of Children's Guardians Act, ch. 125, § 2, 1889 Ind. Acts 261, 261-62 (superseded). In 1889, the general assembly also enacted a statute making it a misdemeanor for those with custody of a child to abandon or neglect that child. Act of Mar. 9, 1889, ch. 201, § 1, 1889 Ind. Acts 363, 363-64 (repealed 1976) (current version at IND. CODE § 35-46-1-4 (Supp. 1996)).

10. Board of Children's Guardians Act, ch. 125, § 2, 1889 Ind. Acts at 262.

board upon a finding that the allegations were true.¹¹ Shortly thereafter, a woman and her husband appealed the Marion Circuit Court's award of the custody of her three children to the Marion County Board of Children's Guardians. In affirming the trial court and the constitutionality of the statute, the Indiana Supreme Court invoked the doctrine of *parens patriae*:

[O]ur constitutions, and our laws enacted under it, sanction and confirm the great principle of the sovereign's guardianship of the children within the dominions of the sovereign. But while it is true that this great principle is thus sanctioned and confirmed, it is still true that the equally great principle that natural right vests in parents the custody and control of their children is confirmed and enforced. This high and strong natural right yields only when the welfare of society or the children themselves comes into conflict with it; but where there is such conflict the supreme right of guardianship asserts itself for the protection of society and the promotion of the welfare of the wards of the commonwealth.¹²

Illinois was the first state to employ the *parens patriae* philosophy to deal with both the juvenile offender as well as the dependent and neglected child. The Illinois legislature passed the first juvenile court act in 1899.¹³ The first judge of the Chicago juvenile court, Richard S. Tuthill, described the "sole purpose" of his new court in terms of *parens patriae*: "[T]o give children what all children need, parental care."¹⁴

The Illinois statute (which would become a model for the nation, one widely used even today) authorized juvenile court judges to hear any case concerning a dependent child or a neglected child.¹⁵ Upon finding that the child's best interest would be served by making the child a public ward, the court had several options, including placements in foster homes and institutions.¹⁶ Similarly, the juvenile court was authorized to hear any case involving children accused of crimes.¹⁷ If the court found the child guilty, it had several dispositional options, including returning the child to the parents, placing the child on probation, or putting the child in foster care or an institution.¹⁸

11. *Id.* § 3 at 262-63 amended by Act of Mar. 9, 1891, ch. 151, sec. 2, § 3, 1891 Ind. Acts 365, 366-67 (superseded).

12. *Van Walters v. Board of Children's Guardians of Marion County*, 32 N.E. 568, 569 (Ind. 1892). See also Addison M. Beavers, *The Philosophy of Children's Court Proceedings*, in FIRST ANNUAL INSTITUTE OF THE JUVENILE AND CRIMINAL COURT JUDGES OF INDIANA 1 (1960).

13. Illinois Juvenile Court Act, 1899 Ill. Laws 131 (repealed 1965).

14. Richard S. Tuthill, *The Juvenile Court*, in INDIANA BULLETIN OF CHARITIES AND CORRECTION, June 1904, at 48, 52. See also Mack, *supra* note 1, at 109.

15. Illinois Juvenile Court Act § 7, 1899 Ill. Laws 131, 133 (repealed 1965) (current version at 705 ILL. COMP. STAT. 405/3-9 (West 1992)).

16. *Id.* § 8 at 133 (repealed 1965).

17. *Id.* § 9 at 134 (current version at 705 ILL. COMP. STAT. 405/2-1 (West 1992 & Supp. 1996)).

18. *Id.*

In transferring jurisdiction over children accused of crimes from adult criminal court to the *parens patriae* juvenile court, the constitutional safeguards applicable to juvenile offenders when prosecuted as adults fell by the wayside. The *parens patriae* philosophy mandated that the juvenile court provide children with care, custody, and discipline approximating, as nearly as possible, that which should be given by their parents. It provided that juvenile offenders should not be treated as criminals, but rather as children in need of aid, encouragement, and guidance.¹⁹ Precisely because their purpose was to treat and rehabilitate—not punish—the child, it became a fundamental legal doctrine that juvenile proceedings were civil in nature rather than criminal.²⁰ Further, because these courts were not criminal courts, they did not have to provide the constitutional guarantees enjoyed by persons charged with crimes.²¹ As one Indiana juvenile court judge would say many years later:

We are a Court *for* children, and children need no constitutional guarantees to protect them in the Courts *for* children. The Courts are given a great deal of power under the Juvenile Court law, which should always be used *for* the children and never *against* them.²²

This theory remained well-entrenched in American law until rejected by a landmark series of Supreme Court rulings beginning in 1966 concerning the

19. LOU, *supra* note 1, at 9-10. See Illinois Juvenile Court Act § 21, 1899 Ill. Laws 131, 137 (repealed 1965) (codified as amended in 705 ILL. COMP. STAT. 405/2-1 (West 1992)) ("This act shall be liberally construed, to the end that its purpose may be carried out, to-wit: That the care, custody and discipline of a child shall approximate as nearly as may be that which should be given by its parents . . .").

20. See *In re Gault*, 387 U.S. 1, 14-18 (1967).

21. *Id.* at 14-15 & n.15; LOU, *supra* note 1, at 10; Mack, *supra* note 1, at 109. Juvenile courts were unsuccessfully challenged in other states during this era as depriving children of liberty without due process of law: *Ex parte Sharp*, 96 P. 563, 564 (Idaho 1908); *Marlow v. Commonwealth*, 133 S.W. 1137, 1141 (Ky. 1911); *State ex rel. Matacia v. Buckner*, 254 S.W. 179, 180 (Mo. 1923); violating the right to trial by jury: *Ex parte Januszewski*, 196 F. 123, 129-30 (C.C.S.D. Ohio 1911); *Ex parte Daedler*, 228 P. 467, 469-71 (Cal. 1924); *Marlow*, 133 S.W. at 1141; *Matacia*, 254 S.W. at 180; *Commonwealth v. Fisher*, 62 A. 198, 200 (Pa. 1905); *Mill v. Brown*, 88 P. 609, 612 (Utah 1907); and denying the right of appeal: *Januszewski*, 196 F. at 131; *Marlow*, 133 S.W. at 1141. The enactment of juvenile court statutes have also survived attacks against them as impermissibly creating a new court: *Lindsay v. Lindsay*, 100 N.E. 892, 894 (Ill. 1913); *Marlow*, 133 S.W. at 1138-39; *Ex parte Powell*, 120 P. 1022, 1023-26 (Okla. Crim. App. 1912); *Fisher*, 62 A. at 199; constituting class legislation: *Robison v. Wayne Circuit Judges*, 115 N.W. 682, 685 (Mich. 1908) (but striking the act for failure to provide a twelve-person jury); *Fisher*, 62 A. at 199; constituting local or special laws: *Cinque v. Boyd*, 121 A. 678, 685 (Conn. 1923); *Ex parte Loving*, 77 S.W. 508, 511-14 (Mo. 1903); *Mill*, 88 P. at 611; embracing more than one subject: *Robison*, 115 N.W. at 684; *Fisher*, 62 A. at 198; and conferring executive powers on judicial officers: *Nicholl v. Koster*, 108 P. 302, 305 (Cal. 1910).

22. Beavers, *supra* note 12, at 3 (emphasis in original).

applicability of constitutional rights in juvenile proceedings.²³

II. ENACTMENT OF THE INDIANA STATUTE

It is probably not surprising that Indiana was an early participant in the juvenile court movement, given the substantial commitment the state had made to helping dependent and neglected children. The 1889 Board of Children's Guardians Act was clearly a forerunner of the Indiana Juvenile Court Act.²⁴ That year also saw establishment of the Board of State Charities, a new state agency with responsibility for investigating and examining "the whole system of public charities and correctional institutions of the State."²⁵ In 1897, the general assembly gave the Board of State Charities a most important, if immodestly referred to, assignment: "child-saving."²⁶ Child-saving generally referred to the work of agents of the Board of State Charities in finding homes for dependent and neglected children and in supervising them after placement. A top priority was removing children from orphanages which existed in most Indiana counties and placing those children in family homes.

Excerpts from the early reports of the Board of State Charities's child-saving efforts give a flavor of this work. For example, the first report of the Board's state agent in charge of child-saving stated:

There are a few children that the public will have to support for an extended period, some permanently, but it should not be required to support any child, not a defective, if a good family home can be found to take it in and give it the natural training. The institution can do certain things for the child, but only in the rarest of cases is it other than a detriment to the child to require it to spend the impressionable years of its life in a place where the struggle for the means of existence is not daily witnessed and taken part in by the child. Long residence in an institution teaches a child to expect his support whether he earns it or not. When he goes out into the world to take care of himself, as he eventually must, he has to learn all those lessons that the home-bred boy has already acquired, almost unconsciously, in his daily contact with his fellows and the people surrounding him.

. . . .

23. See *infra* note 142 and accompanying text.

24. See LOU, *supra* note 1, at 18 (citing the Indiana Children's Guardians Act as an "immediate precedent of the Illinois juvenile court legislation").

25. Board of State Charities Act, ch. 37, § 2, 1889 Ind. Acts 51, 52 (repealed 1963). The Board of State Charities was not responsible for the management of these institutions but roughly performed the central office functions of today's Family and Social Services Administration and Department of Correction.

26. Orphan, Dependent, Neglected and Abandoned Children Act, ch. 40, § 8, 1897 Ind. Acts 44, 47 (repealed 1978). See INDIANA BD. OF STATE CHARITIES, ANNUAL REPORT 6, 33 (1897).

It is a principle in child-saving that for every homeless child there is some family home open that is suitable for that child and that would take it in and care for it, if the opportunity offered. Much of the difficulty encountered in placing children is to select the right child for the right home. We might state it the other way—the selection of the right home for the child. But the children we have; the homes we have to find.

....

Our special effort is to place the children on farms as far as possible. To this end no effort is made to find city or town homes for them. No such home is refused, if it is a good one. We are influenced in selecting the farm home in preference to the city one largely because it more effectually removes the child from familiar surroundings and enables him to start anew. We think, too, that he will sooner learn the dignity of labor and sooner fit himself for his life struggle there.²⁷

And this exuberant assessment in the state agent's report for 1901:

The State Agents have placed in family homes the past year 223 children, most of whom remain off public support. Thus far in its history, this agency has placed in private families 839 children, 62% of whom the public is relieved from maintaining. When we recall that it costs about \$100 to support each child, in an orphan's home, the saving to the State in a financial way may be computed at \$60,000 per annum. Of how much more value to the State is the saving of the children!²⁸

Although dependent and neglected children were being "saved," alleged juvenile offenders for the most part were being confined with adults pending trial, being tried in the police and other adult criminal courts, and if convicted, incarcerated with adult offenders.²⁹ At that time, juvenile offenders were not beneficiaries of *parens patriae*.³⁰

This was the situation in Indiana, at the turn of the century, when the protagonist of our story, George W. Stubbs, became Indianapolis Police Court Judge. Stubbs was born in Shelby County, Indiana, in September 1837, and spent his boyhood days there. He studied law, but soon after the beginning of the Civil War, he enlisted as a private in the Sixteenth Indiana Volunteer Infantry and served with honor in the Signal Corps. At the close of the war, he practiced law in Shelbyville for a time. In about 1871, he came to Indianapolis where he

27. George W. Streeter, *State Agent's Report*, in INDIANA BD. OF STATE CHARITIES, ANNUAL REPORT 34, 35, 39 (1897).

28. *Child-Saving Work in Indiana and Other States*, INDIANA BD. OF STATE CHARITIES, ANNUAL REPORT 30 (1901).

29. 1903-1905 REPORT, *supra* note 3, at 5.

30. *But see* Fox, *supra* note 4, at 1192-1193 (arguing that juvenile offenders were in fact treated differently than adults by the adult criminal courts as a result of *parens patriae*).

continued to practice.³¹

When Stubbs took the bench to begin his second term as judge of the police court in the fall of 1901, he professed himself to be “astonished at the marked increase in the number of juvenile offenders brought before him. During the first thirty days of his second term more children under sixteen years of age were arrested for violations of the law than had been brought into court during his first two-year term.”³² Judge Stubbs himself called the situation one of “grave concern,”³³ and it was reported some years later that the “idea of sending these children to jail, or even to the Reform School, if there was a possibility of saving them from the stigma of a sentence, and perhaps from a criminal career, was repugnant to his mind.”³⁴

Judge Stubbs moved to alleviate the situation. On the first Friday in November 1901, he began the practice of setting aside one day each week for the trial of all children under sixteen years of age.³⁵ He secured the cooperation of Indianapolis Police Chief George A. Taffe in preventing the arrest and detention of children in the city prison. Instead, Stubbs and Taffe, serving under Mayor Charles A. Bookwalter, worked out a plan under which patrolmen took the boys and girls they arrested to their homes and instructed the parents to bring them to the police court on the following Friday.³⁶ Stubbs said, “Bonds were asked in serious violations of the law, but in the majority of cases the word of the parent and the child was taken as sufficient guarantee for the latter’s appearance, and only in rare instances was this confidence abused.”³⁷

Privacy of juvenile proceedings was a matter of importance to Stubbs, and he tried to insure that only “those immediately concerned” attended the juvenile hearings.³⁸ Because the construction of his courtroom made that “almost impossible,” Stubbs tried holding hearings in his private chambers. He ultimately secured space in the City Building for the use of a special juvenile courtroom in the early spring of 1902. Through his own efforts, Judge Stubbs had created a de facto juvenile court in Indiana.³⁹

But Stubbs was far from satisfied. He described the court as “very inadequate”:

31. *Injuries Fatal to Judge G.W. Stubbs*, INDIANAPOLIS NEWS, Mar. 4, 1911, at 5; see also Ray Boomhower, *George W. Stubbs*, in *ENCYCLOPEDIA OF INDIANAPOLIS* 1306-07 (David J. Bodenhamer et al. eds., 1994).

32. 1903-1905 REPORT, *supra* note 3, at 5.

33. *Id.*

34. *Origin and Formation of the Juvenile Court*, INDIANAPOLIS NEWS, June 22, 1907, at 19.

35. 1903-1905 REPORT, *supra* note 3, at 5.

36. James A. Collins, *The Juvenile Court Movement in Indiana*, 28 INDIANA MAG. HIST. 1 (1932).

37. 1903-1905 REPORT, *supra* note 3, at 1.

38. *Id.*

39. Collins, *supra* note 36, at 3; see also Michelle D. Hale, *Juvenile Justice*, in *ENCYCLOPEDIA OF INDIANAPOLIS* 857-58 (David J. Bodenhamer et al. eds., 1994).

By far the most serious drawbacks were the lack (1) of preliminary investigation, (2) of adequate means of discipline, and (3) of preventive supervision following cases of suspended sentence. The law made no provision for the investigation of children's cases except as it directly concerned the offence itself. The trials were thus necessarily conducted from the point of view of punishment alone, since neither a knowledge of the causes leading to the offence, nor means for removal of such causes, was provided for. So obvious did this lack become that the Charity Organization Society^[40] of the city detailed one of its workers to the Court in the fall of 1902 to assist in the work of more thorough investigation. Of this, and other agencies, the Judge made use to supplement the information of the Police Department, but the knowledge was practically rendered futile because the Court was given such limited authority in dealing with the child. The prerogative of suspended sentence was frequently used, but without supervision it was merely another name for complete discharge.⁴¹

At some point, Stubbs became aware of the new juvenile court in Chicago. One story has it that he mentioned his frustration at his limited authority in dealing with juveniles one evening at the family supper table. His daughter, described as a "reading girl," is said to have suggested that he read a recent magazine which contained a short article about a juvenile court in Chicago. After reading it, he decided to go to Chicago.⁴² Stubbs himself said he first learned of the Chicago juvenile court in 1901 from Amos W. Butler, the Secretary of the Board of State Charities, who advised him to go to Chicago and visit Judge Tuthill.⁴³

Stubbs apparently made several trips to Chicago. He makes reference in one place to a trip in late 1901⁴⁴ and in another place to trips in February and April, 1902.⁴⁵ There is another report of a trip involving Stubbs, police court prosecutor James A. Collins, and *Indianapolis News* reporter William M. Herschell in August 1902. According to Collins, during this trip, Stubbs spent three days in Chicago watching proceedings in Judge Tuthill's court and gathering information.⁴⁶

40. The Charity Organization Society was founded in 1880 as an administrative, investigative and referral service for affiliated charities. In 1922, it merged with other similar organizations to form the predecessor of today's Family Service Association. Patricia A. Dean, *Charity Organization Society*, in *ENCYCLOPEDIA OF INDIANAPOLIS* 402-03 (David J. Bodenhamer et al. eds., 1994).

41. 1903-1905 REPORT, *supra* note 3, at 6.

42. *Origin and Formation of the Juvenile Court*, *supra* note 34, at 19.

43. George W. Stubbs, *Juvenile Courts*, in *INDIANA BULLETIN OF CHARITIES AND CORRECTION*, June 1904, at 56.

44. Letter from Judge George W. Stubbs to Amos W. Butler, Secretary, Indiana Board of State Charities (Dec. 28, 1901), in *BOARD OF STATE CHARITIES CORRESPONDENCE COLLECTION* (Indiana State Archives, Commission on Public Records, Indianapolis).

45. 1903-1905 REPORT, *supra* note 3, at 6.

46. Collins, *supra* note 36, at 2.

Stubbs began working with a group of interested citizens to prepare a legislative proposal to the next general assembly that would establish a permanent juvenile court in Indianapolis. Stubbs said that although

[t]here was no doubt whatever in the mind of those interested that some law should be passed . . . , [t]here was . . . considerable difference of opinion as to the wisest and best form for this jurisdiction to take: whether it should be exercised by the Police, Criminal, or Circuit Court, or by an absolutely distinct and separate Court.⁴⁷

Collins also recalled that the proposal to move all juvenile cases from several existing authorities to administration by a single court, met with opposition.⁴⁸ In any event, a meeting was convened by the Charity Organization Society and civic leader and philanthropist, John H. Holliday⁴⁹ at the office of the Union Trust Company. At least a dozen community leaders and judges attended, among them State Senator Charles N. Thompson.⁵⁰ The group agreed “that the best interests of the children” demanded that, at least in Indianapolis, an absolutely distinct and separate court should be created.⁵¹ Senator Thompson agreed to sponsor the bill.⁵²

Judge Stubbs did not restrict his efforts to organize support for legislative enactment of a juvenile court to one end of Market Street. Even as Indianapolis leaders were meeting at the Union Trust Company to organize support for the legislation, Stubbs was also developing allies in the statehouse. The most important of these was with Butler, Secretary of the Board of State Charities.

Butler is also a key figure in this story. He was born in Brookville on October 1, 1860, and earned an A.B. degree in 1894 and an A.M. degree in 1900 from Indiana University. Later in life he was awarded LL.D. degrees from Hanover College and Indiana University. Butler served as Board Secretary for twenty-five years, from 1898 to 1923; he served both Republican and Democratic governors. Widely known and nationally honored, he served as president of both the National Conference of Charities and Corrections and the American Prison Association.⁵³ At the time of his death, Butler was called the “Father of Social Work in Indiana” and “[a]n earnest advocate for progressive legislation in behalf of the state’s underprivileged.”⁵⁴

47. 1903-1905 REPORT, *supra* note 3, at 7.

48. Collins, *supra* note 36, at 2, 3-4.

49. Holliday (May 31, 1846-Oct. 20, 1921) also founded *The Indianapolis News* and the Union Trust Company. Richard G. Groome, *John Hampden Holliday*, in *ENCYCLOPEDIA OF INDIANAPOLIS* 700 (David J. Bodenhamer et al. eds., 1994).

50. Collins, *supra* note 36, at 4.

51. 1903-1905 REPORT, *supra* note 3, at 7.

52. Collins, *supra* note 36, at 4.

53. *Amos W. Butler Dies; Welfare Authority*, INDIANAPOLIS STAR, Aug. 6, 1937, at 1, in 16 INDIANA BIOGRAPHY SERIES 82-83 (Indiana State Library); *Services to be Held Saturday for Dr. Amos W. Butler*, INDIANAPOLIS NEWS, Aug. 6, 1937, at 1, in 16 INDIANA BIOGRAPHY SERIES 83-85 (Indiana State Library).

54. Editorial, *Dr. Amos W. Butler*, INDIANAPOLIS STAR, Aug. 8, 1937, at 6, in 16 INDIANA

On December 28, 1901, Stubbs wrote to Butler that since his return from Chicago, he had been extremely busy but encouraged Butler to arrange for a meeting involving the mayor, members of the Board of Public Safety, and "other gentlemen and ladies referred to by you."⁵⁵ Butler immediately responded and suggested that the two of them get together and "go over the situation especially in light of your Chicago experience. At that time we could arrange for the conference of which we spoke and to which you refer."⁵⁶ Although I have been unable to find further specific reference to their meeting, Butler's agency's annual report for the fiscal year ended October 31, 1901, recommended that the legislature establish a juvenile court.⁵⁷

This recommendation was issued in late 1901, and the legislature did not meet in 1902, so no action was taken. However, it did set the stage for a more extensive discussion and recommendation in the board's annual report for the next year. In the 1902 report, Butler wrote:

In 1889, the Legislature of Indiana enacted into law the old common law principle that the court was the guardian of all minor children. This is known as the Board of Children's Guardians Law. The purpose is to improve the condition of children who are in vicious or immoral surroundings, either by the renovation of the home, or the removal of the children. This law has been very efficient. It has done much for the prevention of pauperism and crime. The same principles have been carried out in some of the larger cities of our land in the establishment of juvenile courts. Chicago is entitled to the credit of having organized the first of these. Other cities have followed her lead. A few months ago Judge George W. Stubbs, of the Indianapolis Police Court, established, without authority of law, a children's court. It was necessary to develop plans for the proper conduct of this court, the investigation of cases, and the supervision of children. Under the circumstances, it is believed that much good has been done through the establishment of this court, and we believe that proper legislation providing for juvenile courts in the larger cities of this State, and for the probation system, would be wise.⁵⁸

The annual report went on to make the following recommendation to the legislature:

Arrangements should be made for the establishment by law of a separate court for juveniles in the larger cities or counties of our State. This has

BIOGRAPHY SERIES 84 (Indiana State Library).

55. Letter from Judge George W. Stubbs to Amos W. Butler, *supra* note 44.

56. Letter from Amos W. Butler, Secretary, Indiana Board of State Charities to Judge George W. Stubbs (Dec. 31, 1901), in BOARD OF STATE CHARITIES CORRESPONDENCE COLLECTION (Indiana State Archives, Commission on Public Records, Indianapolis).

57. INDIANA BD. OF STATE CHARITIES, ANNUAL REPORT 21 (1902).

58. INDIANA BD. OF STATE CHARITIES, ANNUAL REPORT 22-23 (1903).

been tried in other cities and proven very effectual. Under its proper operation, children need not be confined in the jail at all. They would be released under proper security, to appear at a specified time. The children would be tried in a separate room, at a different time from the other prisoners. The trial should be informal, and children, if necessary, can be paroled and placed in an orphans' home or such other place as is esteemed best for their welfare. When we realize that it is from the children that our prison population is to be recruited, those things which are inaugurated and will deal wisely and vigorously with the children who are entering evil ways, are surest to be most beneficial and result at a great saving to the State.⁵⁹

Winfield T. Durbin, a Republican, was Indiana's governor at this time. Born May 4, 1847, in Lawrenceburg and not formally educated beyond elementary school, Durbin fought in the Union army and then came to Indianapolis. While working in the state capital, he met and married Bertha McCullough, the daughter of a wealthy Anderson businessman. He successfully pursued a variety of business interests in Anderson and eventually took over his father-in-law's interests. He achieved military prominence during the Spanish-American War as the colonel of an infantry regiment organized in Indiana that fought in Cuba. Using his business and military credentials, he secured the 1900 Republican gubernatorial nomination and was elected governor later that year. Durbin was the Republican nominee again in 1912, but the national split between the Republicans and the Progressives doomed his candidacy. He died December 18, 1928.⁶⁰

Governor Durbin retained Amos Butler as the Secretary of the Board of State Charities, and when the governor delivered his State of the State Address to the 63rd Indiana General Assembly on January 8, 1903, he followed the Board's and Butler's recommendation in favor of the establishment of a juvenile court:

A children's court has been, in a measure, established by the Police Judge of Indianapolis, and the results are very satisfactory. There is, however, no specific law on the subject. Provision should be made by law for the establishment of such juvenile courts in the larger cities of the State. Wide latitude should be given to such courts to deal with juvenile offenders. It has been tried in cities of other states, and has proven

59. *Id.* at 30.

60. *W. T. Durbin, 81, Former Indiana Governor, Dies*, INDIANAPOLIS STAR, Dec. 19, 1928, at 1, in 3 INDIANA BIOGRAPHY SERIES 222-224 (Indiana State Library); *see also Winfield T. Durbin*, INDIANAPOLIS NEWS, Dec. 19, at 1, 1928, in 3 INDIANA BIOGRAPHY SERIES 231 (Indiana State Library); *see also Winfield T. Durbin*, INDIANAPOLIS NEWS, Dec. 18, 1928, in 3 INDIANA BIOGRAPHY SERIES 210 (Indiana State Library). At the time of his death, the newspapers reported that one of the major controversies of his administration involved legal proceedings: Governor Durbin refused to surrender to Kentucky its former governor, William Taylor, who was wanted in connection with the death of a defeated candidate for governor, William Geobel, on grounds that Taylor would not receive a fair trial. *W.T. Durbin, 81, Former Governor, Dies*, INDIANAPOLIS STAR, Dec. 19, 1928, at 1.

effectual. Under the proper operation of such court children need not be confined in the jails. They could be released under proper security to appear at specified times and be let out on probation, to remain under the supervision and control of the court. They should be tried at least at a separate time, if not in a separate room, from adult offenders. It is from these juvenile offenders that criminals are recruited, and the establishment of a juvenile court would, in my opinion, go far toward eliminating from the ranks of hardened criminals these young recruits.⁶¹

With administration support, State Senator Charles N. Thompson introduced Senate Bill 38, which called for the establishment of the juvenile court.⁶² Thompson was serving his second term from Indianapolis. Born in Covington in 1861, he had graduated from Indiana Asbury College (now DePauw University) in 1882, and then worked as a clerk in the office of the recorder of the Indiana Supreme Court.⁶³ In 1885, he received a master's degree from DePauw and was admitted to the Indiana bar later that year.⁶⁴ He practiced law in Indianapolis from 1886 until his retirement in 1931. Following his two terms in the state legislature, he became a figure of considerable influence and prominence in local bar, historical and philanthropic activities. He died in 1949.⁶⁵

Senator Thompson reportedly stated some thirty years later that there was little opposition to the bill in the Senate, but considerable and serious opposition in the House.⁶⁶ I have been unable to find any contemporary accounts of such difficulty, and in 1905, Judge Stubbs described the bill as passing "with but little opposition."⁶⁷ But the bill was significantly amended twice as it traveled through the legislature—the second time following gubernatorial veto.⁶⁸ Although it is uncertain how controversial these provisions were, it seems reasonably clear that there was some disagreement on the bill's provisions and that it fell to Senator Thompson to devise an appropriate compromise.

Senate Bill 38 closely tracked the 1899 Illinois statute and contained several provisions that would later be modified.⁶⁹ The first of these provisions dealt with court jurisdiction. As discussed above, dependent and neglected children were subject to the jurisdiction of the circuit court under the Board of Children's

61. Governor Winfield T. Durbin, *Message to the Sixty-Third General Assembly of Indiana*, in INDIANA SENATE JOURNAL 45 (1903).

62. S. 38, 63d Gen. Ass'y (Ind. 1903).

63. *Charles Nebeker Thompson*, 2 BIOGRAPHICAL DIRECTORY OF THE INDIANA GENERAL ASSEMBLY 413 (Justin Walsh et al. eds., 1984); *Charles Thompson, Dies in Michigan*, INDIANAPOLIS TIMES, Aug. 16, 1949, at 1.

64. *Retired Attorney Dies*, DEPAUW ALUMNUS 22 (1949).

65. *Id.*

66. Collins, *supra* note 36, at 8 n.7.

67. 1903-1905 REPORT, *supra* note 3, at 7.

68. INDIANA SENATE JOURNAL 45 (1903).

69. Illinois Juvenile Court Act, 1899 Ill. Laws 131 (repealed 1965); S. 38 (as originally introduced), 63d Gen. Ass'y (Ind. 1903).

Guardians' Act, and delinquent children were subject to the jurisdiction of the sundry criminal courts, depending upon the severity of their offenses. Following the Illinois act, the bill introduced in Indiana created a new juvenile court in each county with jurisdiction over the cases of dependent, neglected, and also delinquent children.⁷⁰

Second, again like Illinois, the bill provided that the circuit court judge was to be the judge of the juvenile court.⁷¹ Although the bill as introduced created a new court, its apparent practical effect was to transfer jurisdiction for all accused delinquents from the sundry criminal courts to the circuit court judge in his capacity as judge of the juvenile court. The circuit court judge retained jurisdiction over the cases of dependent or neglected children; but it would henceforth be exercised as judge of the juvenile court. No separate juvenile court for Indianapolis would have been created under the bill as introduced.

The third issue already visited in another context is the constitutional rights of the accused child. Despite the prevailing mood of courts of other states,⁷² Thompson inserted language guaranteeing the right to a jury trial to any child in juvenile court.⁷³ The bill also provided that no child under fourteen was to be committed to a jail or police station. If a child was unable to give bail, the child was to be committed to the care of the sheriff, police matron or probation officer, who was to keep the child "in some suitable place provided in the city or county, pending the final disposition of its case."⁷⁴ The Indiana bill as introduced differed from the Illinois act only with regard to these two provisions. The Illinois act had no provision for jury trials, and the ban on jailing children extended only to age twelve, not fourteen.⁷⁵

Fourth, the Illinois act, although specifically authorizing the placement of delinquent and dependent and neglected children in private institutions, provided that the juvenile court act did not affect any other provision of law affecting industrial or training schools. This was reported to be the result of a power struggle over whether state or private institutions would care for delinquent children, a struggle won by the private charities.⁷⁶ This struggle may also have led to the act's instruction that the juvenile court take the religious preference of the child's parents into account in making placements.⁷⁷ The Indiana bill, as

70. *Id.*

71. As will be discussed in a moment, Senate Bill 38 was ultimately amended to create a free-standing juvenile court in Indianapolis, separate from the circuit court. Because Illinois did not create free-standing juvenile courts in 1899, one commentator contended that the juvenile court in Indianapolis was really the nation's first. Collins, *supra* note 36, at 4-5.

72. *See supra* note 21.

73. S. 38, § 3 (as originally introduced), 63d Gen. Ass'y (Ind. 1903).

74. *Id.* § 9.

75. Illinois Juvenile Court Act, § 11, 1899 Ill. Laws 131, 135 (repealed 1965) (current version at 705 ILL. COMP. STAT. 405/5-7 (West 1992 & Supp. 1996)).

76. Fox, *supra* note 4, at 1225-29.

77. Illinois Juvenile Court Act §§ 7, 9, 20, 1899 Ill. Laws 131, 133, 134, 137 (repealed 1965) (current version at 705 ILL. COMP. STAT. 405/2-27 (West 1992 & Supp. 1996)).

introduced, contained all of these provisions as well as language giving the Board of State Charities extensive powers to inspect and regulate all private institutions and schools into which delinquent, dependent and neglected children were placed.⁷⁸

It is important to keep in mind that, with the notable exception of the jury trial guarantee and the age of children prohibited from being incarcerated with adults, the Indiana bill, as introduced, was the same as the Illinois act. What is not clear is whether this was the result of the scrivener's use of a sister state's language or the sponsor's concurrence with the policy choices represented by a sister state's act.

Senate Bill 38 was first referred to the First Division of the Senate Judiciary Committee on January 9, 1903, of which Senator Thompson was a member.⁷⁹ On January 14, the committee reported the bill back to the full Senate with a "do pass" recommendation.⁸⁰

Apparently between January 14 and January 29, a decision was made that the contents of the bill needed to be revised. On the latter date, Senator Thompson asked that the bill be sent back to committee for "further consideration."⁸¹ On February 3, the Judiciary Committee reported back a new version of Senate Bill 38 that made significant changes in the four areas of the bill just discussed.⁸²

Similar to the bill as introduced, the juvenile court was given jurisdiction over delinquency, dependency and neglect cases. However, the new language provided that criminal complaints against juveniles would continue to be filed in adult criminal court, and, after investigation by the probation department, would be transferred to juvenile court.⁸³ Thus, delinquency cases would not be filed directly in juvenile court. Second, a separate, free-standing juvenile court was authorized for Indianapolis, but the bill retained the provision specifying that circuit court judges would preside over the juvenile courts of all the other counties.⁸⁴

Third, and most importantly, the right to a jury trial was diluted, with approval of the trial court required before a juvenile could receive a jury trial.⁸⁵ However, the language restricting the jailing of children under fourteen remained unchanged.⁸⁶

78. S. 38 §§ 6, 15, 18 (as originally introduced), 63d Gen. Ass'y (Ind. 1903).

79. INDIANA SENATE JOURNAL 78 (1903). The Judiciary Committee was comprised of two divisions. The first division, to which Senate Bill 38 was referred, consisted of Senator Parks, the chairman, and Senators Thompson, Wood, Dausman, Hendee, DeHaven, Lawler, Harrison and Milburn. *Id.* at 62.

80. *Id.* at 111.

81. *Id.* at 306.

82. S. 38 (as reported by Senate Committee on Judiciary No. 1 on February 3, 1903), 63d Gen. Ass'y (Ind. 1903) [hereinafter "S. 38, Feb. 3 version"], INDIANA SENATE JOURNAL 351-358 (1903).

83. S. 38, Feb. 3 version, §§ 1, 3, INDIANA SENATE JOURNAL 352, 354 (1903).

84. S. 38, Feb. 3 version, § 1, INDIANA SENATE JOURNAL 352 (1903).

85. S. 38, Feb. 3 version, §§ 3, 7, INDIANA SENATE JOURNAL 355, 356-57 (1903).

86. *Id.*

Fourth, language giving the statutes governing industrial and training schools precedence over the juvenile court statute and requiring deference to parents' religious preferences in placement was deleted. Again, it is not clear whether this was done because that language was not relevant in Indiana or because of a significant policy choice by the legislature. In any event, the Board of State Charities retained the strong regulatory powers given to it in the original bill.⁸⁷

These amendments primarily suggest a desire to create a separate court for Judge Stubbs. They also indicate support for broader discretion of juvenile court judges embodied by the *parens patriae* doctrine at the expense of the child's constitutional rights. The changes seem to reflect the strong hand of Amos Butler and his Board of State Charities in establishing a strong regulatory role in the care of delinquent, and dependent and neglected children. Finally, the amendments may represent a reluctance on the part of criminal court judges to relinquish jurisdiction over cases involving delinquent children.

From this point, the bill rapidly moved forward. In the Senate, it cleared second reading on February 9,⁸⁸ and, on February 16,⁸⁹ it passed by a vote of 35-0.⁹⁰ In the House of Representatives, the bill was assigned to the Committee on the Affairs of the City of Indianapolis on February 17.⁹¹ On February 19, the Committee Chair, Representative Muir, reported the bill back to the House with a "do pass" recommendation.⁹² On February 24, the bill had its second reading and was ordered to a third reading.⁹³ On February 25, the bill passed the House by a vote of 77-3.⁹⁴ Because the House had passed the bill in the same form as it had originally passed the Senate, no further action was required, and the bill was sent to the Governor.⁹⁵

But, on March 2, 1903, Governor Durbin vetoed the bill. He had been advised by Attorney General Charles W. Miller that the bill was unconstitutional

87. S. 38, Feb. 3 version, § 8, INDIANA SENATE JOURNAL 357 (1903). Provisions requiring prior approval of the Board of State Charities for the articles of incorporation or changes in the articles of incorporation of private associations was apparently inadvertently deleted in committee but reinstated on the floor. See *infra* note 89.

88. *Id.* at 610.

89. An apparent inadvertent deletion during recommitment required a special third reading amendment on the Senate floor. The bill was first referred to a committee of one, consisting of Senator Thompson, for an amendment reinstating a provision included in the original bill authorizing the Board of State Charities to approve or reject the articles of incorporation or any amendments to the articles of any "association whose objects may embrace the caring for dependent, neglected or delinquent children." *Id.* at 730.

90. *Id.* at 731.

91. INDIANA HOUSE JOURNAL 826 (1903). The Committee on Affairs of the City of Indianapolis consisted of Representative Muir, the chair, and Representatives Wright, Tarkington, Morgan, Miner, Bamberger, Stechhan, Wells and Corn.

92. *Id.* at 911.

93. *Id.* at 998.

94. *Id.* at 1053; INDIANA SENATE JOURNAL 969 (1903).

95. INDIANA HOUSE JOURNAL 1178 (1903).

because it did not provide sufficient legal protection for the children who would be brought into juvenile court.⁹⁶ In particular, it violated the right of the accused to a speedy trial because of the investigation requirement and because court approval was needed to receive a trial by jury.⁹⁷ In his veto message, Governor Durbin said:

The act provides that no child under the age of fourteen years shall be incarcerated in jail, but if a child should be over fourteen years of age and under the maximum age, during this preliminary investigation by the probation officer, such child might under the provisions of this bill, be confined in the jail, and thus be denied the right of a speedy trial guaranteed by the constitution.

The act does not provide the kind of trial that shall be had—whether it shall be governed by the rules governing trials in the circuit or criminal courts. In fact it makes no provision for a trial of any kind or the manner in which such trial should be conducted, except in very general terms. It makes no provision for an appeal to any court, either circuit, supreme or appellate, although the general appeal statutes might cover cases of this kind.

The act provides: "That in every trial of any such child, he shall be entitled to a trial by a jury of twelve persons, if he shall so elect and the court approve."

The latter clause evidently abridges the right of trial by jury, and unquestionably, insofar as the right is abridged, it is unconstitutional.⁹⁸

Governor Durbin noted that he was "in sympathy with the general features" of the bill and referred to the fact that he had called for the adoption of a juvenile court in his State of the State Address. He indicated to the legislature that he would give his approval to a bill establishing a juvenile court if the objectionable features were eliminated.⁹⁹

Senator Thompson responded by introducing Senate Bill 393 on March 3, the day after the veto. The new bill was identical in all respects to Senate Bill 38 except that two provisos were added to section 3.¹⁰⁰ The first removed the clause that had given the trial judge the authority to deny an accused child a jury trial.¹⁰¹ The second provided that if a child was unable to make bond and the trial court did not release them on their own recognizance, then the child was entitled to an

96. *Juvenile Court Bill*, INDIANAPOLIS NEWS, Mar. 3, 1903, at 1.

97. *Id.*

98. INDIANA SENATE JOURNAL 1148 (1903).

99. *Id.* at 1148-49.

100. S. 393 (as originally introduced), 63d Gen. Ass'y (Ind. 1903).

101. *Id.* § 3.

immediate hearing and trial in juvenile court.¹⁰² The Senate suspended the rules in order to permit all three readings of the bill to occur on the same day and sent the bill to the House after approving it by a vote of 40-0.¹⁰³ The bill passed the House unchanged on March 5 by a vote of 71-11.¹⁰⁴ Having satisfied his objections, Governor Durbin signed Enrolled Senate Act 332 into law on March 10, 1903.¹⁰⁵

With the juvenile court bill now law, immediate attention turned to the appointment of the new juvenile court judge. Judge Stubbs, of course, was the logical choice. On March 12, 1903, he wrote Governor Durbin as follows:

It is very embarrassing to me to ask anything for myself, but I would greatly appreciate the appointment of Judge of the new Juvenile Court, and would esteem it a very great favor indeed if you could see your way clear to give me the place.

I have handled the cases against boys and girls for some sixteen months now, and have become greatly interested in the work. With the experience I have had I believe I could be of great benefit to the children as well as to the community under the new law.¹⁰⁶

At the same time, a long list of prominent Indianapolis citizens signed a letter to the governor recommending his appointment. In their letter they said,

Judge Stubbs has done more than any other one man in our city to bring about the legislation on [the] subject [of the Juvenile Court]. For more than a year he has maintained a separate court for the trial of children's cases and has met with marked success. His appointment to this office will meet with the approval of all of our citizens.¹⁰⁷

Governor Durbin apparently had no difficulty in swiftly agreeing to Stubbs' appointment.¹⁰⁸ Thus, Indianapolis had a free-standing juvenile court, and all

102. *Id.*

103. INDIANA SENATE JOURNAL 1152-54 (1903).

104. INDIANA HOUSE JOURNAL 1368-69 (1903).

105. INDIANA SENATE JOURNAL App. 89 (1903).

106. Letter from Judge George W. Stubbs to Governor Winfield T. Durbin (Mar. 12, 1903), in GOVERNOR WINFIELD T. DURBIN CORRESPONDENCE COLLECTION (Indiana State Archives, Commission on Public Records, Indianapolis).

107. Among the three dozen signatories to this letter were insurance agency owner John J. Appel; postmaster Henry W. Bennett; political figure and hotel proprietor William E. English; father of the Indianapolis park system Dr. Henry Jameson; Senator Thompson; retail hardware, manufacturing and supply businessman Franklin Vonnegut; and Fletcher Savings and Trust Company President Evans Woollen. Letter to Governor Winfield T. Durbin (undated), in GOVERNOR WINFIELD T. DURBIN CORRESPONDENCE COLLECTION (Indiana State Archives, Commission on Public Records, Indianapolis). For information on the signatories listed, see ENCYCLOPEDIA OF INDIANAPOLIS (David J. Bodenhamer et al. eds., 1994).

108. 1903-1905 REPORT, *supra* note 3, at 7 (Stubbs was appointed on March 23, 1903.).

other counties of the state had juvenile courts as well, existing under the auspices of their circuit courts.

That Indiana was a forerunner in the juvenile court movement cannot be disputed. The Illinois Juvenile Court Act was approved April 21, 1899;¹⁰⁹ the Colorado Juvenile Court Act was approved March 7, 1903,¹¹⁰ and our Juvenile Court Act was approved March 10, 1903.¹¹¹ Though differing from each other in some respects,¹¹² each act was virtually identical to the others in the power and flexibility given to the juvenile court judge in dealing with delinquency cases. Each also contained the following language, which reflected the *parens patriae* philosophy:

This act shall be liberally construed, to the end that its purpose may be carried out, to-wit: That the care, custody and discipline of the child shall approximate as nearly as may be that which should be given by its parents, and in all cases where it can properly be done, the child is to be placed in an improved family home and become a member of the family,

109. Illinois Juvenile Court Act, 1903 Ill. Laws 131 (repealed 1965).

110. Colorado Juvenile Court Act, 1903 Colo. Sess. Laws 178. Currently, article 2 of the Colorado Children's Code deals with the juvenile justice system in Colorado.

111. Indiana Juvenile Court Act, ch. 237, 1903 Ind. Acts 516 (repealed 1963).

112. Although these three statutes had many similarities, the juvenile court system differed somewhat from bill to bill. The Illinois act conferred jurisdiction over both delinquency and dependency and neglect cases on the circuit and county courts of each county in Illinois and authorized the judges of the circuit court of Cook County to designate one of their number to hear all juvenile cases in a special courtroom. Illinois Juvenile Court Act, §§ 1-3, 1899 Ill. Laws 131, 131-32 (repealed 1965) (current version at 705 ILL. COMP. STAT. 405/1-11, 2-1, 2-2 (West 1992 & Supp. 1996)). Any party being tried under the Illinois act was entitled to a six person jury. *Id.* § 2 at 132 (repealed 1965) (current version at 705 ILL. COMP. STAT. 405/1-2 (West 1992 & Supp. 1996)). The Colorado act conferred jurisdiction over delinquency cases (but not dependency or neglect cases) upon all county courts of the state, with the larger counties in the state authorized to refer to such proceedings as occurring in juvenile court. Colorado Juvenile Court Act §§ 1-2, 1903 Colo. Sess. Laws 178, 178-79 (current version at COLO. REV. STAT. ANN. § 19-1-104 (West 1996)). There were no provisions in the Colorado act dealing with jury trials. The Indiana act, as we have seen, explicitly created a juvenile court presided over by the local circuit court judge in each county of the state, with a separate, free-standing juvenile court in Marion County for delinquency, dependency and neglect cases. Indiana Juvenile Court Act, ch. 237, § 1, 1903 Ind. Acts 516, 517 (repealed 1963) (current version at IND. CODE § 31-6-2-1.1 (Supp. 1996)). This feature led one Hoosier observer to argue "that Indiana is entitled to the credit of having established the first separate Juvenile Court." Collins, *supra* note 36, at 7. And, of course, the Indiana act guaranteed a child a trial by a twelve member jury. Indiana Juvenile Court Act, ch. 237, § 3, 1903 Ind. Acts 516, 519 (repealed 1978). See IND. CODE § 31-6-7-3 (Supp. 1996) (outlining rights of juveniles and procedure for waiving those rights); *Beldon v. State*, 657 N.E.2d 1241, 1244 (Ind. Ct. App. 1995). See also IND. CODE § 31-6-3-1 (Supp. 1996) (rights of juveniles in juvenile court proceedings); *id.* § 31-6-7-10(g) (Supp. 1996).

by legal adoption or otherwise.¹¹³

III. A JUVENILE COURT FOR INDIANAPOLIS

It appears that Judge Stubbs got most, if not all, of what he wanted in the new legislation. First, the act specifically addressed Stubbs's concern over the privacy of juvenile proceedings by mandating that trials be held in chambers or the juvenile courtroom and authorizing the judge to exclude from the courtroom any and all persons whose presence the judge considered unnecessary for the trial of the case.¹¹⁴

Second, the act authorized the establishment of juvenile probation officers, to be appointed by the juvenile court judge. Their duties included: investigation of charges made against juveniles, attendance at every trial "in the interest of the child on trial," and assistance in placement and supervision of the child following trial and disposition of the case.¹¹⁵

Third, the juvenile court was authorized to select from a wide range of alternatives in disposing of cases. Under the statute, criminal charges could still be filed in any criminal court against a child.¹¹⁶ However, unless the crime charged was punishable by death or a life sentence, the criminal court judge was required to notify the juvenile probation officer. If, after investigation, it appeared to the probation officer that the child was guilty, the case would be transferred to the juvenile court.¹¹⁷ After a hearing, the juvenile court judge was authorized to make one of the following dispositions based on what would best serve "the public interest and the interest of the child":

- (1) Return the child to his or her parents, guardians or friends;
- (2) Place the child in the family of some suitable person until age 21 or any less time;
- (3) Place the child in the county orphanage or some other Indiana

113. Colorado Juvenile Court Act § 12, 1903 Colo. Sess. Laws 178, 186 (current version at COLO. REV. STAT. ANN. § 19-1-101 (West 1996)). Indiana Juvenile Court Act, ch. 237, § 10, 1903 Ind. Acts, ch. 516, 522 (repealed 1978) (current version at IND. CODE § 36-6-1-1.1 (Supp. 1996)); Illinois Juvenile Court Act § 21, 1899 Ill. Laws 131, 137 (repealed 1965) (current version at 705 ILL. COMP. STAT. 405/1-2 (West 1992 & Supp. 1996)).

114. Indiana Juvenile Court Act, ch. 237, § 4, 1903 Ind. Acts 516, 519-20 (repealed 1978) (current version at IND. CODE § 31-6-7-10 (Supp. 1996)).

115. *Id.* §§ 2-4, 1903 Ind. Acts at 517-20 (§ 2 repealed 1963; §§ 3, 4 repealed 1978); *see* IND. CODE § 31-6-4-19 (Supp. 1996).

116. This provision was deleted in 1905, permitting the direct filing of criminal complaints against juveniles in juvenile court thereafter. Act of Feb. 27, 1905, ch. 45, sec. 1, § 3, 1905 Ind. Acts 51, 51-55 (repealed 1978) (current version at IND. CODE § 31-6-2-1.1 (Supp. 1996)).

117. Indiana Juvenile Court Act, ch. 237, § 3, 1903 Ind. Acts 516, 518 (repealed 1978) (current version at IND. CODE § 31-6-2-1.1 (Supp. 1996)).

institution regulated and approved by the State Board of Charities;

- (4) If the child was found guilty of the offense charged and appeared to the court to be "wilfully wayward and unmanageable," send the child to Boys' School, the Industrial School for Girls, or to any state penal or reformatory institution; or
- (5) If the health or condition of the child required it, place the child in a public hospital or institution for treatment or special care, or in a private hospital or institution, which would receive it for like purposes without charge.¹¹⁸

On April 1, 1905, Judge Stubbs issued a report of the activities of the juvenile court during its first two years of existence. In this fascinating document, Stubbs sets as his court's goal "the actual training of its wards into law-abiding citizenship." The following methods were employed:

- (1) The complete isolation of juvenile delinquents from adult offenders in the hearing of their cases and in the place of detention;
- (2) Thorough investigation of the character and history of every child and of its environment preliminary to the trial;
- (3) Wide latitude in the disposition of the child for its best individual welfare; and
- (4) A complete system of supervision over the wards of the Court subsequent to their trial.¹¹⁹

Stubbs was particularly proud of his probation system, which he described as "the distinctive feature of the Court."¹²⁰ What made it distinctive was the use of volunteer probation officers. Using such organizations as the YMCA, the Boys' Club, the Neighborhood House, the Indiana Children's Home Society, the Charity Organization Society, and local churches as his base, Stubbs established a permanent organization of volunteer probation officers. At the time of his April 1, 1905, report, there were 305 persons on his volunteer list, 172 of whom had provided actual service plus 133 on a waiting list pending assignment.¹²¹ Stubbs' description of his volunteer corps has the surprisingly contemporary ring of diversity:

The personnel of this volunteer force has been thoroughly representative of the life of the community as a whole, and of the special districts in which they have exercised supervision. Men and women,

118. *Id.* See IND. CODE § 31-6-4-15.4 (Supp. 1996) (listing dispositional options).

119. 1903-1905 REPORT, *supra* note 3, at 8.

120. *Id.* at 12.

121. *Id.* at 15.

Catholic, Protestant, and Hebrew, white and colored, have all joined in the common task of correcting the tendencies of the wayward children of Indianapolis.¹²²

Because the volunteer probation system was the centerpiece of Stubbs' system, it warrants further description. Investigations were conducted by court-employed probation officers. Once a child likely to require supervision was identified through investigation, a volunteer probation officer living in the area of the child's home was notified. The child was assigned to the probation officer at the completion of the court proceeding. The child and the probation officer were expected to be in weekly contact with at least one visit to the child's home every month. The probation officer was expected to monitor the child's attendance, conduct, progress at school, and the child's employment record, if any. The probation officer was also expected to keep track of the child's conduct in the neighborhood "from the patrolman in the district."¹²³ Stubbs also asked the volunteer probation officers to make a monthly written report to the court.¹²⁴

After two years, Stubbs seemed upbeat but realistic about the work. He noted that of 446 children placed on probation during the first two years of the court, sixty-three eventually were sent off "to institutions for rugged discipline" and that other "slow in responding" children had remained on probation.¹²⁵ But he emphasized that the relationship of volunteer probation officer and child had also resulted in numerous instances of a child's

awakening and development of new standards of right and wrong. . . . These instances justify the statement that after two years' experience the volunteer probation system has been proved the most vital function exercised by the Juvenile Court, because it enabled the Court to provide for every juvenile offender, not punishment, but a friend.¹²⁶

IV. RECOGNITION AND IMITATION

A few months after the establishment of the juvenile court in Indiana, the Board of State Charities held its annual meeting in Fort Wayne in September. Juvenile courts were very much on the mind of the conference, which reserved its final session for a very special series of presentations. The first speaker was none other than the founder of the nation's first juvenile court, Judge Richard S. Tuthill of Chicago. Judge Tuthill gave a lengthy presentation on his philosophy of rehabilitating juvenile offenders and on the history of the Illinois act. He also praised the Indiana statute for authorizing paid probation officers.¹²⁷ Judge Stubbs

122. *Id.* at 16.

123. *Id.* at 17.

124. *Id.* at 17-18.

125. *Id.* at 18-19.

126. *Id.* at 20.

127. Richard S. Tuthill, *The Juvenile Court*, in INDIANA BULLETIN OF CHARITIES AND CORRECTION, June 1904, at 48, 54-55.

then praised Judge Tuthill for his work in organizing the country's first juvenile court. Stubbs also thanked Tuthill for the latter's time and ideas during Stubbs's trips to visit the Chicago juvenile court. Stubbs went on to describe his experience in the Indianapolis Police Court leading to the passage of the Indiana act and reflected on the first six months of its operation.¹²⁸ Stubbs was followed by one of the two paid probation officers of his court, Helen W. Rogers. Rogers described the mechanics of the Indianapolis juvenile probation system and had particular praise for the volunteer probation officer corps. In discussing the results obtained from the first six months of the court's operation, she turned to the subject of gangs:

It has been the practice of the court to place on probation all known members of troublesome "gangs" and if possible to discover the "ringleader," and treat him accordingly. The result has been that in neighborhoods where one or two boys have been sent to the Indiana Boys' School and the others probationed, there have been decided improvements in local conditions.¹²⁹

As suggested by Judge Tuthill's visit to Indiana, our state was developing a reputation as a leader in dealing with the problems of troubled youth. Amos Butler would say with pride in the 1903 annual report of the Board of State Charities that "the Juvenile Court Law, . . . with the Dependent Children Law passed by the Legislature of 1897, and the new Board of Children's Guardian's Law passed in 1901, are three laws which, taken together, make such a provision for unfortunate childhood as to be found in few, if any, of the States of our Union."¹³⁰ Dr. Charles R. Henderson, a noted University of Chicago sociology professor, reviewed these three laws and concluded that Indiana had "adopted an enlightened modern policy and [was] rapidly creating the machinery for carrying it into effect."¹³¹ This placed Indiana "among the foremost commonwealths of the world in this sphere of wise and just care of the children of the State."¹³²

Stubbs himself had also become well-known. On June 22, 1904, he addressed the annual meeting of the National Conference of Charities and Correction on the topic of "Work of the Juvenile Court."¹³³ His work attracted international attention as well, with his juvenile court system reportedly used in Sweden, Italy, and

128. George W. Stubbs, *Juvenile Courts*, in INDIANA BULLETIN OF CHARITIES AND CORRECTION, June 1904, at 56.

129. Helen W. Rogers, *The Probation System of the Marion County Juvenile Court*, in INDIANA BULLETIN OF CHARITIES AND CORRECTION, June 1904, at 62, 65.

130. INDIANA BD. OF STATE CHARITIES, ANNUAL REPORT 8 (1903).

131. Charles R. Henderson, *The Children of the State*, in INDIANA BULLETIN OF CHARITIES AND CORRECTION, June 1905, at 133, 134.

132. *Id.*

133. Letter from Amos W. Butler, Secretary, Board of State Charities, to Judge George W. Stubbs (Apr. 29, 1904), in BOARD OF STATE CHARITIES COLLECTION, LETTER BOOK 795 (Indiana State Archives, Commission on Public Records, Indianapolis).

several other European countries.¹³⁴

When Judge Stubbs met an untimely death in a streetcar accident in front of his courthouse on March 4, 1911, he was greatly mourned.¹³⁵ His successor, Judge Newton M. Taylor, would praise him as the father of the juvenile court who always looked out for the welfare of the child in need.¹³⁶ Two decades later, a Columbia University doctoral student, in his dissertation on the juvenile court movement, listed Stubbs as one of four judges identified as pioneers of the juvenile court movement because of their "real accomplishments."¹³⁷

V. JUVENILE COURTS IN INDIANA AFTER 1903

It is not within the scope of this Article to give anything more than the most superficial treatment to the development of juvenile courts in Indiana since the first Juvenile Court Act in 1903. Important amendments were made to the Juvenile Court Act in both 1905¹³⁸ and 1907¹³⁹ so that, by 1907, delinquency, dependency and neglect cases, and cases against parents were being filed in juvenile court. This expanded jurisdiction resulted in the Indianapolis court becoming known as the juvenile and domestic relations court (though it did not have jurisdiction over divorces).¹⁴⁰ In 1945, the general assembly adopted a major revision of the juvenile court act.¹⁴¹ Between 1966 and 1975, the U.S. Supreme Court rendered an important series of decisions concerning the applicability of constitutional rights in juvenile proceedings.¹⁴² In 1978, a new juvenile code was adopted, reflecting the recent U.S. Supreme Court decisions and the new Indiana criminal code.¹⁴³ However, the purpose of the current juvenile code clearly "represents a continuation of the purposes upon which the state's first juvenile

134. *Learn from Indianapolis; Italy Adopts Stubbs's Plan*, INDIANAPOLIS STAR, Jan. 10, 1909, at 30; *Injuries Fatal to Judge G.W. Stubbs*, INDIANAPOLIS NEWS, Mar. 4, 1911, at 5.

135. *Injuries Fatal to Judge G.W. Stubbs*, *supra* note 134, at 5.

136. BIENNIAL REPORT OF THE JUVENILE & DOMESTIC RELATIONS COURT OF MARION COUNTY 9-10 (1910-1912) [hereinafter 1910-1912 REPORT].

137. LOU, *supra* note 1, at 23.

138. Act of Feb. 27, 1905, ch. 45, 1905 Ind. Acts 51 (repealed 1978).

139. Act of Feb. 23, 1907, ch. 41, 1907 Ind. Acts 59 (repealed 1974) (modifying definition of dependent child).

140. 1910-1912 REPORT, *supra* note 136, at 1-2; 2 LEANDER J. MONKS, COURTS AND LAWYERS OF INDIANA 852-53 (1916).

141. Act of Mar. 9, 1945, ch. 347, 1945 Ind. Acts 1647 (repealed 1978) (establishing juvenile courts in counties with a population that exceeded 250,000 inhabitants).

142. *Breed v. Jones*, 421 U.S. 519 (1975) (double jeopardy); *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (trial by jury); *In re Winship*, 397 U.S. 358 (1970) (proof beyond reasonable doubt); *In re Gault*, 387 U.S. 1 (1967) (due process in delinquency adjudications); *Kent v. United States*, 383 U.S. 541 (1966) (due process in waiver proceedings). See Dan Hopson, Jr., *Symposium on Juvenile Problems: In re Gault: Introduction*, 43 IND. L.J. 523 (1968).

143. Act of Mar. 10, 1978, No. 136, 1978 Ind. Acts 1196 (codified as amended in scattered sections of the Indiana Code).

court act was predicated in 1903 and which formed the foundation for the 1945 Act.”¹⁴⁴ As the 21st century approaches, there is a growing sense that it is again time to rewrite the Indiana juvenile code. In response to a request from the Indiana Council of Juvenile and Family Court Judges and the Chief Justice of Indiana, Randall T. Shepard,¹⁴⁵ the general assembly recently authorized a comprehensive study on that subject.¹⁴⁶

CONCLUSION

This Article, I will concede, gives an overwhelmingly favorable review of the early juvenile court in Indiana and its slightly older sibling, the “Child-Saving” Department of the Board of State Charities. Other authors on this subject have found these developments changed nothing of substance,¹⁴⁷ and some have viewed it as creating mischief, constitutional and otherwise.¹⁴⁸ A recent national television commentary illustrates this negative appraisal:

Poor and immigrant parents in the 19th century would see children removed from households for what was said to be insufficient moral instruction. The Children’s Aid Society bound out city kids in the mid-19th century in a forced immigration. They called them captives of urban wretchedness and sent them to live on farms. There was an effort to Americanize ethnic children by separating them from their families and giving them a segregated education. Juvenile courts arose as mechanisms for taking children away from parents who were deemed unfit. Foster care developed with the aim of separating children from parents forever.¹⁴⁹

But rather than close with this pessimistic view of history, I prefer to conclude with a passage written about Judge Stubbs in 1916. Although its sentimental and naïve tone admittedly plays into the hands of the skeptics, I think these words also suggest that we are better off for the efforts of the juvenile court pioneers:

Judge Stubbs was . . . largely responsible for the great good that the court

144. J. Richard Kiefer, *Commentary*, in WEST’S ANNOTATED INDIANA CODE (Title 31, pt. 2), 14-17 (1979).

145. Randall T. Shepard, *The Challenge of a Challenged Profession*, Remarks to the Indiana General Assembly (Jan. 17, 1996), reprinted in RES GESTAE, Feb. 1996, at 35-36.

146. Act of Mar. 14, 1996, No. 253, 1996 Ind. Acts 2812. This statute creates a fifteen member Juvenile Code Study Commission to “study issues of concern relating to the juvenile laws and make recommendations for their revision and improvement.” The Commission is charged with giving particular attention to “(1) The delivery of juvenile services to delinquent, dependent, neglected, and mentally ill children. (2) The treatment and care of children in need of services and the payment of such treatment and care.” *Id.* at 2813.

147. Fox, *supra* note 4, at 1230.

148. See *In re Gault*, 387 U.S. 1, 18-28 (1967).

149. Roger Rosenblatt, *Essay*, on THE NEWSHOUR WITH JIM LEHRER, Feb. 12, 1996, Transcript #5461.

is now performing for the city of Indianapolis. He . . . blazed the way and worked out a system of handling children and their parents, which has proven very successful. This kindly, genial man, by his wholesome advice and admonition, started hundreds of wayward and delinquent boys and girls on the road to upright and useful manhood and womanhood. His appeals to drunken and dissolute fathers and mothers brought happiness to many a home in Indianapolis. Yet, if the milk of human kindness failed to bring about the proper results, he did not shirk from sending recreant fathers to the workhouse or vicious mothers to a place where they would not have the opportunity to injure their children. He was always looking out for the welfare of the child, and many children now living in the city have been rescued from vicious, immoral and drunken parents and placed in surroundings where they might have a fair chance to become useful citizens. He returned to their homes many runaway or vagrant children each year, sending them either to their own homes or intrusting them to the care of some children's institutions. Sick and afflicted children were given needed medical attention; abandoned children were properly cared for. In fact, it is impossible to estimate the good which this man did for the children of the city.¹⁵⁰

150. 2 MONKS, *supra* note 140, at 854-55.

THE INDIANA SUPREME COURT AND THE STRUGGLE AGAINST SLAVERY

SANDRA BOYD WILLIAMS*

James Scott of Clark County, Jesse Holman of Dearborn County and John Johnson of Knox County, took the bench for the first term of the Indiana Supreme Court on May 5, 1817.¹ Only two cases were on motion to the court in the first term, and only three in the second term.² By the court's second term, Isaac Blackford had been appointed to the bench to fill the vacancy left by the death of John Johnson.³

Indiana had just attained statehood, and its supreme court was quickly confronted with the issue of slavery. From its very first opinions dealing with slavery, the court held that Indiana was a free state that allowed neither slavery nor involuntary servitude.⁴ With a few aberrations, the court held the line against slavery through numerous opinions decided before and during the Civil War era. This task was not always easy because Indiana borders Kentucky, at that time, a slaveholding state. This Article examines the historical, political and social context of a few of the court's more significant cases decided between its inception in 1817 and 1866.

Three years after its inception, the Indiana Supreme Court heard its first slavery case. *Lasselle v. State*⁵ examined the Knox Circuit Court's ruling in *Polly (a woman of colour) v. Lasselle* that allowed Lasselle to exercise ownership over Polly.⁶ Lasselle had bought Polly's mother from Indians inhabiting the Northwest Territory before it was ceded to the United States. While in Lasselle's custody, Polly filed for a writ of habeas corpus in the trial court seeking her freedom.⁷ Polly's attorneys argued that although her mother may have been taken by Indians and sold as a slave, "yet by the laws of nature and nation," neither Polly nor her

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1. 1 LEANDER J. MONKS, COURTS AND LAWYERS OF INDIANA 181 (1916).

2. ISRAEL G. BLAKE, THE HOLMANS OF VERAESTAU 16 (1943).

3. 1 MONKS, *supra* note 1, at 182.

4. *State v. Lasselle*, 1 Blackf. 60 (Ind. 1820); *In re Clark*, 1 Blackf. 122 (Ind. 1821) (entitled in the reporter as "The Case of Mary Clark, a Woman of Color").

5. 1 Blackf. at 60.

6. *Id.* at 61.

7. Record at 1, *Polly (a woman of colour) v. Lasselle* (Knox Cir. Ct. 1820) (handwritten) (contained in Indiana Supreme Court case file, *State v. Lasselle*, July term, 1820, on file with Indiana State Archives, Commission on Public Records, Indianapolis) [hereinafter *Polly (a woman of colour)*].

offspring could be held as slaves.⁸ Specifically, Polly's attorneys argued that because Polly was born after the Ordinance of 1787, which prohibited slavery and involuntary servitude in the Northwest Territory,⁹ she was entitled to freedom.¹⁰

The Knox Circuit Court determined that: (1) because Polly's mother was a slave prior to the passage of the Ordinance of 1787 and prior to the Northwest Territory being ceded from Virginia, where slavery was legal, passage of the Ordinance of 1787 did not liberate Polly's mother¹¹; and (2) because, in slave states, the master was entitled to the benefit of the slave and the slave's offspring, there is "no reason why it should not be the case here."¹² Therefore, the court held that Polly "was born a slave, [and Lasselle] can hold her as such."¹³

The Indiana Supreme Court reversed the decision of the trial court, freed Polly, and awarded her costs against Lasselle.¹⁴ Relying on the Indiana Constitution of 1816, Judge Scott wrote:

In the 11th article of that instrument, sec. 7, it is declared, that "There shall be neither slavery nor involuntary servitude in this State, otherwise than for the punishment of crimes, whereof the party shall have been duly convicted." It is evident that by these provisions, the framers of our constitution intended a total and entire prohibition of slavery in this State; and we can conceive of no form of words in which that intention could have been more clearly expressed.¹⁵

The will of Indiana's people, as expressed in her constitution, was that "slavery can have no existence in the State of Indiana"¹⁶

In addition to being the first case decided by the Indiana Supreme Court addressing the issue of slavery, *Lasselle* is notable for a number of other reasons, including the parties and the attorneys involved. Hyacinthe Lasselle was a man of some fame as the principal tavernkeeper in Vincennes, Indiana.¹⁷ Jacob Call, who later became a judge and eventually a congressman, was Lasselle's attorney.¹⁸ Amory Kinney, Moses Tabbs and Col. George McDonald represented Polly.¹⁹

8. *Id.* at 3.

9. Ordinance of 1787, art. 6 (1787), in LAWS OF THE NORTHWEST TERRITORY 1788-1802, at 69 (Cincinnati, n.p. 1833) ("There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes whereof the party shall have been duly convicted . . .").

10. *Polly (a woman of colour)*, *supra* note 7, at 3.

11. *Id.* at 4.

12. *Id.* at 5.

13. *Id.* at 6.

14. *Lasselle*, 1 Blackf. at 63.

15. *Id.* at 62. See also IND. CONST. of 1816, art. XI, § 7.

16. *Lasselle*, 1 Blackf. at 62.

17. Dorothy Clark, *First Local News Editor Voiced Anti-Slavery View*, TERRE HAUTE TRIB.-STAR, Jan. 16, 1966, at 4.

18. *Id.*

19. *Id.*

Amory Kinney had read law in the office of Samuel Nelson who later became a U.S. Supreme Court Justice.²⁰ Kinney's law partner and brother-in-law was John Willson Osborn, the owner and editor of Terre Haute's first newspaper.²¹ Moses Tabbs was the son-in-law of Charles Carroll, one of the signers of the Declaration of Independence.²² Col. George McDonald was the mentor and father-in-law of Judge Isaac Blackford.²³

One year after its decision in *Lasselle*, the Indiana Supreme Court reexamined the issue of slavery, this time disguised as a personal services contract. On November 6, 1821, the supreme court decided the case of "a woman of colour called Mary Clark."²⁴ Court records reveal that in 1814 Mary had been purchased as a "slave for life" by Benjamin L. Harrison in Kentucky.²⁵ Harrison brought Mary to Vincennes, Indiana in 1815, and freed her. Contemporaneously with her release from slavery, Mary contracted with Harrison to be his indentured servant for thirty years.²⁶ On October 24, 1816, Harrison "cancelled, annulled and destroyed" the contract for indenture, thereby liberating Mary.²⁷ On the same day, however, Mary, "a free woman of colour," bound herself to General W. Johnston, his heirs, executor, administrator and assigns as an indentured servant and house maid for twenty years.²⁸ On his part, General Johnston agreed to:

find, provide and allow unto her, during all her aforesaid term of servitude, good and wholesome meat, drink, lodging, washing and apparel both linen and woollen, fit and convenient for such a servant. And upon the expiration of her term of servitude, she serving out her present indenture faithfully, give unto her one suit of new clothes (not to exceed however in value twenty dollars) and also one flax wheel.²⁹

Mary's signature was indicated on the contracts with an "X."³⁰

Mary filed for a writ of habeas corpus, claiming that General Johnston "without any just or legal claim" held her as a slave.³¹ General Johnston argued that he had purchased Mary from Harrison for \$350 that Harrison had emancipated Mary and that Mary had indentured herself to Johnston for twenty years.³² The

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *In re Clark*, 1 Blackf. 122 (Ind. 1821).

25. Record at 4, *Mary Clark v. General W. Johnston* (Knox Cir. Ct. 1821) (handwritten) (contained in Indiana Supreme Court case file, *Mary Clark v. G.W. Johnston*, Nov. term, 1821, on file with Indiana State Archives, Commission on Public Records, Indianapolis).

26. *Id.*

27. *Id.* at 4-5.

28. *Id.* at 5.

29. *Id.* at 6.

30. *Id.*

31. *Id.* at 1.

32. *Id.* at 3.

circuit court determined that Mary should be returned to General Johnston, her putative master, to serve out the remainder of her indenture.³³ The circuit court also ordered that General Johnston “recover . . . his costs and charges” from Mary.³⁴

The Indiana Supreme Court reversed. As it had in *Lasselle*, the court relied on the Indiana Constitution’s unequivocal prohibition of slavery and involuntary servitude.³⁵ After noting that all Indiana citizens (including Mary, a woman of colour) could properly enter into contracts, the supreme court held that contracts for personal service could not be enforced through specific performance.³⁶ Judge Holman wrote:

Such a performance, if enforced by law, would produce a state of servitude as degrading and demoralizing in its consequences, as a state of absolute slavery; and if enforced under a government like ours, which acknowledges a personal equality, it would be productive of a state of feeling more discordant and irritating than slavery itself. Consequently, if all other contracts were specifically enforced by law, it would be impolitic to extend the principle to contracts for personal service.³⁷

The court found that by petitioning for a writ of habeas corpus, Mary conclusively demonstrated that her servitude was involuntary.³⁸ Once the fact of involuntary servitude was established, the court merely applied the law. Involuntary servitude was outlawed in Indiana under its constitution.³⁹ Accordingly, the law could not contradict Mary’s declaration to be discharged, and she was freed.⁴⁰ Mary was awarded costs of eighteen dollars and seventy-four and one half cents.⁴¹ Apparently, however, Mary never received her costs from Johnston. The return of the writ of execution states that Johnston had no property or real estate to satisfy the judgment.⁴²

Just as the attorneys and parties in *Lasselle* were notable, so too were the attorneys in the case *In re Clark*. Mary was represented by Charles Dewey, who,

33. *Id.* at 7.

34. *Id.*

35. *In re Clark*, 1 Blackf. at 123 (citing IND. CONST. of 1816, art. XI, § 7).

36. *Id.* at 123-24.

37. *Id.* at 124-25.

38. *Id.* at 123.

39. IND. CONST. of 1816, art. XI, § 7.

40. *In re Clark*, 1 Blackf. at 126.

41. Letter from Henry P. Coburn, Indiana Supreme Court Clerk, to Harrison County Sheriff (Dec. 1, 1821) (contained in Indiana Supreme Court case file, *Mary Clark v. G.W. Johnston*, Nov. term, 1821, on file with Indiana State Archives, Commission on Public Records, Indianapolis).

42. Note dated Apr. 2, 1822, on reverse side of letter from Henry P. Coburn, Indiana Supreme Court Clerk, to Harrison County Sheriff (Feb. 26, 1822) (contained in Indiana Supreme Court case file, *Mary Clark v. G.W. Johnston*, Nov. term, 1821, on file with Indiana State Archives, Commission of Public Records, Indianapolis).

fifteen years later, was appointed to the Indiana Supreme Court.⁴³ Johnston was represented by Jacob Call, the same attorney who had represented Lasselle the previous year.⁴⁴ Judge Holman, the author of the supreme court opinion, was considered a moderate abolitionist.⁴⁵ When Holman came to Indiana from Kentucky around 1810, he brought his wife's slaves with him and freed them.⁴⁶

In 1825, the Indiana Supreme Court heard the appeal of a capital murder case from the Clark Circuit Court.⁴⁷ The appellant, designated as "Jerry (a man of colour)," had been convicted of murdering his master and sentenced to death.⁴⁸ Jerry appealed his conviction on the ground that the verdict was contrary to the evidence.⁴⁹ In an opinion written by Judge Holman, the supreme court reversed the conviction, noting "strong doubts" regarding whether the testimony supported the verdict, and the case was remanded for a new trial.⁵⁰ This decision made a strong statement about the Indiana Supreme Court's commitment to justice for all citizens, black and white.

In 1831, Judges Scott and Holman were replaced on the supreme court by Stephen C. Stevens and John T. McKinney.⁵¹ By this time, the political tide was changing in Indiana. Whereas Indiana legislation in the early 1800s was very much aimed at protecting the rights of persons of color within Indiana, later legislation retreated from this position. For example, in 1839, the Indiana legislature passed a general resolution on the subject of slavery, declaring that "Any interference in the domestic institutions of the slaveholding states of this Union . . . either by congress or the state legislatures, is contrary to the compact by which those states became members of the Union."⁵² This marked a significant change in Indiana's slavery policy and probably resulted from the pressures from Indiana's southern border state, Kentucky.⁵³ In response to Indiana's changed policy, Kentucky adopted a resolution praising its "enlightened, liberal, and patriotic, sister State."⁵⁴

43. 1 MONKS, *supra* note 1, at 198, 292.

44. 1 *id.* at 292.

45. BLAKE, *supra* note 2, at 28.

46. *Id.*; 1 MONKS, *supra* note 1, at 186.

47. *Jerry v. State*, 1 Blackf. 395 (Ind. 1825).

48. *Id.* at 396.

49. *Id.*

50. *Id.* at 398-99.

51. 1 MONKS, *supra* note 1, at 194.

52. Resolution of Jan. 29, 1839, ch. 302, 1838 Ind. Acts 353; *see generally* Emma L. Thornbrough, *Indiana and Fugitive Slave Legislation*, 50 IND. MAG. HIST. 201, 217-218 (1954).

53. Thornbrough, *supra* note 52, at 214-18. During this period, slaves constituted approximately 25% of the population of the South. The 1790 census found 697,642 slaves in the United States, most of them living in the South. By 1860, this population had grown to 3,922,760, all of them in the South. Paul Finkelman, *The Centrality of the Peculiar Institution in American Legal Development*, 68 CHI.-KENT L. REV. 1009, 1032 (1993); U.S. CENSUS BUREAU, NEGRO POPULATION, 1790-1915, at 57 (1918).

54. Resolution of Feb. 23, 1839, 1838 Ky. Acts 390; Thornbrough, *supra* note 52, at 218.

Along with changing tide in Indiana, the federal statutory and case law became increasingly hostile towards slaves seeking freedom. In 1842, the U.S. Supreme Court decided *Prigg v. Pennsylvania*.⁵⁵ Pennsylvania had enacted a law which made it an offense against the state to seize and remove a fugitive slave. This made Pennsylvania a haven for runaway slaves and a stop on the underground railroad. Edward Prigg was indicted under this law for feloniously removing Margaret Morgan, a black woman, from Pennsylvania and taking her to Maryland for the purpose of selling and disposing of her as a slave.⁵⁶ Prigg was actually a bounty hunter for a woman who claimed that Morgan was her runaway slave.⁵⁷ In an opinion delivered by Justice Story, the Taney Supreme Court struck down the Pennsylvania law as unconstitutional.⁵⁸ The *Prigg* Court held that federal legislation dealing with fugitive slaves superseded all state legislation on the same subject and by necessary implication prohibited its enforcement.⁵⁹ As one writer put it, *Prigg* determined that southern slaveholders and their agents had a constitutional right to "self-help" to seize fugitive slaves and obtain their return.⁶⁰

Shortly after the U.S. Supreme Court decided *Prigg*, the Indiana Supreme Court heard an appeal from the Elkhart Circuit Court. In *Graves v. State*,⁶¹ Joseph Graves, Elisha Coleman and Hugh Longmore were tried and found guilty of inciting a riot.⁶² The riot was sparked when Graves, Coleman and Longmore seized Thomas Blackman, an alleged fugitive slave from Kentucky who Graves claimed to be his property.⁶³ Bystanders sought to prevent the defendants from forcibly taking Blackman before the magistrate.⁶⁴ The trial court's instructions to the jury contained Indiana's procedures for seizing fugitive slaves rather than the procedures contained in the federal law on that subject.⁶⁵ (The Indiana procedures were more favorable to the alleged fugitive than the federal procedures.⁶⁶) The jury found in favor of the state, and the court fined the defendants thirty dollars

55. 41 U.S. (16 Pet.) 539 (1842).

56. *Id.* at 543.

57. *Id.* at 539; *see also* *Graves v. State*, 1 Ind. 368, 371 (1849).

58. *Prigg*, 41 U.S. (16 Pet.) at 625-26. Chief Justice Taney dissented from that part of the Court's opinion which held that states could not be compelled to enforce the provisions of the federal law regarding fugitives because this was a function of the federal government. Taney believed that all states had a binding obligation to enforce the federal law. *Id.* at 633 (Taney, C.J., dissenting). Fourteen years later, Chief Justice Taney authored the opinion in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), holding that slaves were property and that slaveholders had constitutionally protected property rights in slaves.

59. *Prigg*, 41 U.S. (16 Pet.) at 617-18, 622.

60. Derrick Bell, *Learning the Three "I's" of America's Slave Heritage*, 68 CHI.-KENT L. REV. 1037, 1046 (1993).

61. 1 Ind. 368 (1849).

62. *Id.*

63. *Id.* at 369.

64. *Id.*

65. *Id.*

66. *See id.* at 369-70.

each.⁶⁷ On appeal, the Indiana Supreme Court held that it was bound by the *Prigg* opinion.⁶⁸ Consequently, the court held that the trial court should have instructed the jury on federal procedures for seizing fugitive slaves. The case was reversed and remanded for a new trial.⁶⁹

Although *Prigg* was primarily used to benefit slaveholders in retrieving alleged runaway slaves, in at least one instance it was used for the opposite effect. Three years after reversing the convictions of Graves, Coleman and Longmore for inciting a riot while trying to seize an alleged fugitive slave, the Indiana Supreme Court reversed a conviction for aiding a slave to escape. In *Donnell v. State*,⁷⁰ Luther Donnell had been convicted in the Decatur Circuit Court of “inducing the escape of” and “secreting” away a “certain woman of color, called Caroline” alleged to be the slave of George Ray of Kentucky.⁷¹ Using the federal preemption analysis of *Prigg*, the Indiana Supreme Court held that the part of the Indiana statute under which Donnell had been convicted was unconstitutional and void because it concerned an issue upon which the U.S. Congress had exclusive jurisdiction.⁷²

One of the most offensive laws during this period was the Fugitive Slave Law of 1850,⁷³ the strictest slaveholder protectionist measure to date. It provided that federal commissioners were to hear fugitive slave cases “in a summary manner” and could issue warrants to turn over the fugitive upon evidence that the accused was a runaway slave.⁷⁴ The evidence could be as slight as an affidavit providing the physical description of the runaway.⁷⁵ This law expressly prohibited the commissioners from admitting testimony of the alleged fugitive,⁷⁶ permitted imprisonment of any person hindering an arrest⁷⁷ and provided for the expenditure

67. *Id.* at 368-69; Record at 5, Joseph A. Graves v. State (Elkhart Cir. Ct. 1849) (handwritten) (contained in Indiana Supreme Court case file, Graves v. State, May term, 1849, on file with Indiana State Archives, Commission on Public Records, Indianapolis).

68. *Graves*, 1 Ind. at 370.

69. *Id.* at 372.

70. 3 Ind. 480 (1852).

71. *Id.* at 480-81; Record at 3, Luther A. Donnell v. State (Decatur Cir. Ct. 1852) (handwritten) (contained in Indiana Supreme Court case file, Donnell v. State, Nov. term, 1852, on file with Indiana State Archives, Commission on Public Records, Indianapolis).

72. *Donnell*, 3 Ind. at 481. *Donnell* was written by Judge Samuel Perkins, who is known primarily for spending his leisure time on the bench preparing an *Indiana Digest* and later *The Indiana Practice* treatise. 1 MONKS, *supra* note 1, at 207.

73. Fugitive Slave Law of 1850, ch. 60, 9 Stat. 462 (1850) (repealed 1864). The Fugitive Slave Law of 1850 amended the 1793 law. Fugitive Slave Law of 1793, ch. 7, 1 Stat. 302 (1793) (repealed 1864). The 1850 law was adopted in response to the demands of the representatives of the slave states and was part of a series of measures known as the Compromise of 1850. EMMA L. THORNBROUGH, *THE NEGRO IN INDIANA BEFORE 1900*, at 114-115 (1957).

74. Fugitive Slave Law of 1850, § 6, 9 Stat. at 463.

75. *Id.* § 10 at 465.

76. *Id.* § 6 at 463.

77. *Id.* § 7 at 464.

of federal funds to recover fugitives.⁷⁸ Officials were paid ten dollars if the accused was determined to be a fugitive, but only five dollars if the accused was not.⁷⁹

Obviously, under this statute, every black person was in danger of being declared a fugitive, taken south, and sold into slavery. Armed with this weapon, many unscrupulous slaveholders and slave catchers literally kidnapped free blacks and sold them into slavery. The Fugitive Slave Law of 1850 provided a strong incentive for blacks to seek refuge in Canada, where they would be beyond the reach of the slave catchers.⁸⁰ As a result of this act, trips increased along the underground railroad, which went through Indiana on the way to Canada.⁸¹ The act also resulted in Indiana anti-slavery jurisprudence, prompting *Freeman v. Robinson*,⁸² which was decided in 1855.

Freeman was a free black man who came to Indianapolis in 1844 and "who through hard work and thrift had acquired some real estate, including a house and garden and a restaurant."⁸³ According to the 1850 census, Freeman was the wealthiest black person in Indianapolis, owning property valued at \$7000.⁸⁴ Pleasant Ellington, a Methodist preacher and a major slaveholder in St. Louis, claimed that Freeman was his runaway slave, "Sam."⁸⁵ He and three other men came to Indianapolis to recapture Freeman who he claimed had run away eighteen years earlier, while Ellington was residing in Kentucky.⁸⁶

Assisted by a Deputy U.S. Marshal, Ellington induced Freeman to go to the commissioner's office by telling him that he was required to give testimony before the justice of the peace.⁸⁷ While in the commissioner's office, Ellington sought to examine Freeman without his clothes on.⁸⁸ Both Ellington's attorney and the Deputy Marshal ordered Freeman to remove his clothing for inspection, but upon his attorneys' advice, Freeman refused.⁸⁹ Ellington then requested that the Deputy Marshal forcibly remove Freeman's clothing, but the Deputy Marshal did not believe he had the authority to do so and therefore refused.⁹⁰ Undaunted, Ellington telegraphed the Marshal himself and demanded that he come to Indianapolis.

78. *Id.* § 9 at 465.

79. *Id.* § 8 at 464.

80. THORNBROUGH, *supra* note 73, at 53-54.

81. *Id.* at 40, 53-54.

82. 7 Ind. 321 (1855). For a detailed account of the historical events associated with the *Freeman* case, see Charles H. Money, *The Fugitive Slave Law in Indiana*, 17 IND. MAG. HIST. 180-97 (1921).

83. THORNBROUGH, *supra* note 73, at 115.

84. *Id.* at 142-43 n.39.

85. *Id.* at 115.

86. *Id.*; Money, *supra* note 82, at 159, 182-83.

87. Money, *supra* note 82, at 182.

88. *Id.* at 183.

89. *Id.*

90. *Id.*

When U.S. Marshal John Robinson arrived, he complied with Ellington's request, physically removing Freeman's clothing so that Ellington and his three witnesses could "inspect" Freeman.⁹¹ Having completely examined Freeman, Ellington and his witnesses were ready to testify to all the marks on Freeman's body and swear in court that those marks established Freeman as Ellington's runaway slave, Sam.⁹²

Freeman had a reputation, among blacks and whites in Indianapolis, for being a good, honest and industrious man.⁹³ When newspapers reported the fraudulent manner in which Freeman was induced to appear at the commissioner's office, as well as the violence of Freeman's examination, the public was outraged.⁹⁴ Freeman's attorneys went to the Marion Circuit Court and obtained a writ of habeas corpus claiming that Freeman could prove that he was a free man.⁹⁵ That court, however, determined that it did not have jurisdiction over the case and Freeman was remanded to the custody of the U.S. Marshal pending the federal commissioner's decision.⁹⁶

Freeman's attorneys then sought bail for their client for the nine weeks he would otherwise have to remain in jail.⁹⁷ A note was drawn for \$1600 and signed by 100 citizens, including Judge Blackford and well-known attorney Calvin Fletcher.⁹⁸ In addition, a bond for \$4000 was signed by a number of citizens owning property with a total value of more than half a million dollars to indemnify him.⁹⁹ Despite these efforts, the commissioner denied bail and ordered Freeman held in jail.¹⁰⁰ U.S. Marshal Robinson, thereafter, charged Freeman three dollars per day for a guard to watch over him.¹⁰¹

To prove Freeman was indeed a free man, his attorneys traveled to his previous home in Georgia to obtain witnesses to testify on his behalf.¹⁰² Several witnesses came.¹⁰³ Freeman's attorneys were also able to locate the real "Sam," who had fled to Canada after passage of the Fugitive Slave Law.¹⁰⁴ Freeman's attorneys offered to pay Ellington's expenses to Canada to verify Sam's identity,

91. *The Freeman Case*, THE LOCOMOTIVE (Indianapolis), Sept. 24, 1853, at 1.

92. Money, *supra* note 82, at 183.

93. *Id.* at 180-81.

94. THE LOCOMOTIVE (Indianapolis), Aug. 20, 1853, at 2; *id.* Sept. 24, 1853, at 1; *id.*, May 13, 1854, at 3.

95. Money, *supra* note 82, at 186.

96. *Id.*

97. *Id.*

98. *Id.* at 186-87.

99. *Id.* at 187.

100. *Id.*

101. *Id.*

102. *The Freeman Case*, *supra* note 91, at 1; THE LOCOMOTIVE (Indianapolis), Aug. 20, 1853, at 2.

103. INDIANAPOLIS MORNING, Aug. 26, 1853, at 3; THE LOCOMOTIVE (Indianapolis), Aug. 20, 1853, at 2; *The Freeman Case*, *supra* note 91, at 1.

104. *The Freeman Case*, *supra* note 91, at 1.

but Ellington refused.¹⁰⁵ Faced with the mounting evidence, Ellington gave up the fight, and the commissioner dismissed the case.¹⁰⁶ This case had attracted significant attention throughout Indiana, and upon the dismissal of the case, a Fort Wayne newspaper observed that “[i]f Freeman had not had money and friends he must inevitably have been taken off into bondage.”¹⁰⁷

The cost of his freedom exhausted Freeman’s savings and caused him great discomfort and humiliation.¹⁰⁸ He brought suit for \$10,000 damages against Ellington in Marion Circuit Court.¹⁰⁹ After testimony by the Deputy Marshal who had initially tricked Freeman into going to the commissioner’s office, the case was settled in Freeman’s favor for \$2000 plus costs of the suit. The trial court duly entered the judgment.¹¹⁰ Unfortunately, Freeman never collected because Ellington sold all his property and left St. Louis.¹¹¹

Freeman v. Robinson,¹¹² was the appeal of the suit Freeman filed in Marion Circuit Court against U.S. Marshal Robinson for assault and extortion in forcing Freeman to submit to a naked examination and requiring him to pay three dollars per day while in jail. Robinson challenged the jurisdiction of the Marion Circuit Court to hear the case based on the fact that Robinson was a Rush County resident.¹¹³ This challenge relied upon an Indiana statute which provided that a suit must be commenced in the county where the defendant resided.¹¹⁴ Freeman responded that under another provision of the same statute, if the cause arose against a “public officer” for an act done by him by virtue of his office, suit could be commenced in the county where the cause arose.¹¹⁵ The trial court ruled in Marshal Robinson’s favor, and Freeman appealed.¹¹⁶

The Indiana Supreme Court, Judge Gookins writing, affirmed the trial court on the basis of improper venue.¹¹⁷ The court determined that “public officer” in the statute authorizing suits against public officers in the county where the injury occurred only referred to officers of the state and not officers of the federal government.¹¹⁸ The supreme court, however, rejected Marshal Robinson’s federal preemption argument and determined that because assault and battery and extortion were not part his official duties under the Fugitive Slave Law, Freeman

105. *Id.*

106. *Id.*

107. FORT WAYNE SENTINEL, Sept. 8, 1853, at 2.

108. THORNBROUGH, *supra* note 73, at 116.

109. THE LOCOMOTIVE, Sept. 3, 1853, at 2.

110. THE LOCOMOTIVE, May 13, 1854, at 3.

111. Money, *supra* note 82, at 194-95.

112. 7 Ind. 321 (1855).

113. *Id.* at 321-22.

114. 2 IND. REV. STAT. pt. 2, ch. 1, § 33 (1852) (superseded); *Freeman*, 7 Ind. at 323-24.

115. 2 IND. REV. STAT. pt. 2, ch. 1, § 29 (1852) (superseded); *Freeman*, 7 Ind. at 324.

116. *Freeman*, 7 Ind. at 322.

117. *Id.* at 324.

118. *Id.*

could maintain his action for personal injury against the Marshal.¹¹⁹

The Freeman case was a hard-fought battle with prominent attorneys on both sides. Freeman was represented by John Ketchum, Lucien Barbour and John Coburn, all of whom were known to be excellent anti-slavery lawyers.¹²⁰ In addition, John Coburn was the son of Henry P. Coburn, who was the Indiana Supreme Court Clerk during the time *In re Clark* and *Graves v. State* were decided.¹²¹ Ellington was represented by Jonathan Liston and Thomas Walpole, also noted attorneys of the time.¹²² Jonathan Liston and Isaac Blackford represented Robinson.¹²³ Judge Gookins, who wrote the opinion for the supreme court, had practiced law with Amory Kinney, the attorney for Polly in the *Lasselle* case, and had served a newspaper apprenticeship under John W. Osborn, Amory Kinney's law partner and brother-in-law.¹²⁴

Freeman's ordeal profoundly affected the people of Indiana and demonstrated that under the Fugitive Slave Law of 1850, free blacks were likely to be forced into slavery. John Freeman eventually left Indiana and moved to Canada.¹²⁵ Marshal Robinson, who had been a very high ranking political figure before *Freeman*, was never able to recover from the negative publicity he received.¹²⁶

The same year that the Indiana Supreme Court decided *Freeman*, it also decided *Woodward v. State*,¹²⁷ an appeal from the Hendricks Circuit Court. Jordan Woodward was a black man who had been indicted for assault and battery with intent to murder a white man.¹²⁸ At his trial, Woodward offered the testimony of another black man to show that Woodward had acted in self-defense.¹²⁹ The trial court refused to allow the testimony based on an Indiana statute prohibiting blacks from testifying in any case in which any white person was a party in interest.¹³⁰

On appeal, Woodward was represented by John L. Ketchum, one of the attorneys who had represented John Freeman. In his brief, Ketchum argued that the trial court erred in refusing the testimony because the statute did not apply.¹³¹ Although Woodward was black, his attorney argued, the other "party" to the cause

119. *Id.* at 322-23.

120. Money, *supra* note 82, at 181.

121. OLIVER H. SMITH, *EARLY INDIANA TRIALS AND SKETCHES* 367 (Cincinnati, Moore, Wilstach, Keys & Co. 1858).

122. Money, *supra* note 82, at 181.

123. *Freeman*, 7 Ind. at 321.

124. 1 MONKS, *supra* note 1, at 251.

125. Money, *supra* note 82, at 197.

126. *Id.* at 184; see John Robinson, *Letter to the Editor*, INDIANAPOLIS DAILY JOURNAL, Dec. 27, 1855, at 2.

127. 6 Ind. 492 (1855).

128. *Id.*

129. *Id.*

130. *Id.*; Act of Feb. 14, 1853, ch. 42, § 1, 1853 Ind. Acts 60, 60 (superseded).

131. Brief for Appellant at 1, *Woodward v. State*, 6 Ind. 492 (1855) (handwritten) (contained in Indiana Supreme Court case file, *Woodward v. State*, May term, 1855, on file with Indiana State Archives, Commission on Public Records, Indianapolis).

was the State of Indiana, which was “not a ‘white person.’”¹³² As Ketchum eloquently asserted in his brief, the state “is rather a lady of changeable complexion—graciously taking the hue she finds in her adversary.”¹³³ The supreme court, in a per curiam opinion agreed, holding that the state was not a person of any particular color, and therefore, the trial court erred in rejecting the witness.¹³⁴

A decade after the *Freeman* case demonstrated to the people of Indiana the harsh effects of the Fugitive Slave Law of 1850, the Indiana Supreme Court issued an important opinion entitled *Smith v. Moody*.¹³⁵ In that case, the court tackled article XIII of the Indiana Constitution of 1851. Article XIII prohibited blacks and persons of mixed race from coming into or settling in the state after the adoption of the constitution.¹³⁶ It further provided that all contracts made with any black person coming into the state in violation of article XIII were void.¹³⁷ In addition, at the first legislative session after the Constitution was adopted, the Indiana legislature passed “an act to enforce the 13th article of the Constitution,” making it unlawful for blacks to come into, settle in, or become inhabitants of Indiana.¹³⁸

In *Smith*, the black plaintiff (Smith) sued on a promissory note.¹³⁹ The white defendants argued that the contract at issue was void because Smith had come into and settled in Indiana after November 1, 1851, in violation of article XIII.¹⁴⁰ Smith responded that he was a citizen of Ohio, by birth, and, pursuant to the U.S. Constitution, was entitled to all the privileges and immunities of citizens in the several states.¹⁴¹ The trial court rendered judgment in favor of the defendants.¹⁴²

Smith appealed to the Indiana Supreme Court. In an opinion by Chief Judge Gregory, the court held that article XIII of the Indiana Constitution was void because it was repugnant to the Constitution of the United States.¹⁴³ The court also held that free persons of African descent, born within a particular state, and made citizens of that state, are thereby made citizens of the United States and entitled to all the privileges and immunities of citizens in the several states.¹⁴⁴

The importance of this case is punctuated by the fact that the court previously had upheld application of article XIII in several cases.¹⁴⁵ The fact that an entirely

132. *Id.*

133. *Id.*

134. *Woodward*, 6 Ind. at 492.

135. 26 Ind. 299 (1866).

136. IND. CONST. art. XIII, § 1 (repealed 1881).

137. *Id.* § 2 (repealed 1881).

138. 1 IND. REV. STAT. ch. 74, §§ 1-9 (1852) (repealed 1867).

139. *Smith*, 26 Ind. at 299.

140. *Id.*

141. *Id.*

142. *Id.* at 300.

143. *Id.* at 302.

144. *Id.* at 306-07.

145. *See, e.g., Barkshire v. State*, 7 Ind. 389 (1856).

new court took office on January 1, 1865,¹⁴⁶ may explain the reversal on this issue.

From *Lasselle v. State* to *Smith v. Moody*, the Indiana Supreme Court made both bold and subtle statements against slavery and involuntary servitude. It refused to allow its halls to be used as a means for one citizen to exercise ownership over another—whether it be by trickery, force or humiliation. Over time, it withstood the erosive forces of imprudent and impudent legislation. Even though an Indiana favorite son was a party to Mary's "transfer of employment," the Indiana Supreme Court denied these slaveholders sanctuary in their attempts to circumvent anti-slavery legislation by terming it "indentured servitude." Given the political and social climate at the time these decisions were made, the court's position was nothing less than extraordinary.

146. Robert C. Gregory, James S. Frazer, Jehu T. Elliott and Charles A. Ray were all newly elected to the supreme court in 1864. 1 MONKS, *supra* note 1, at 254, 302.

ISAAC BLACKFORD: FIRST MAN OF THE COURT

SUZANN WEBER LUPTON*

When the old judge died, the congressman, whose career owed much to the judge's influence, gave this tribute.

It is hardly possible for persons who live in an old community to appreciate the extent to which, in a new country, the character of a public man may be impressed upon the public mind. There is not a community in Indiana, not a single one, in which the name of Judge Blackford is not a household word. He has been identified with our State since the first; he may be said to be a part of our institutions. Judicial ability, judicial purity approaching almost to the divine, private worth singularly blending the simplicity of childhood with the sober gravity of age, these were represented not simply in the mind of the profession, but in the universal popular mind of Indiana, in the person of Isaac Blackford.¹

Isaac Newton Blackford spent his adult life in visible public service. He sat on the Indiana Supreme Court from September 10, 1817, to January 3, 1853,² a total of over thirty-five years, longer than any other justice to date. A meticulous jurist and devoted scholar of the English common law, Blackford carefully crafted a body of precedent for our young state. His work in drafting and reporting the decisions of the Indiana Supreme Court garnered him and the Indiana judiciary an international reputation.³ Certainly, a man so described would maintain a place of honor in our collective memory; yet, Isaac Blackford is little known to most current members of Indiana's bench and bar. Those who do recognize the name connect it with Blackford's Reports but know little, if anything, about the man who was once a household name. This Article will reintroduce Blackford, whose work helped lead the state "from a wilderness into a cultivated and civilized community."⁴

The son of a wealthy merchant, Isaac Blackford was born in Somerset County, New Jersey in 1786.⁵ After graduating from Princeton University, he took positions "reading the law," first with Col. George McDonald and then with Judge

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1. 1 LEANDER J. MONKS, COURTS AND LAWYERS OF INDIANA 192 (1916).

2. 1 *id.* at 175.

3. William W. Thornton, *Isaac Blackford, the Indiana Blackstone*, 8 IND. HIST. BULL. 316 (1931) [hereinafter Thornton, *Indiana Blackstone*].

4. *Id.*

5. A. Van Doren Honeyman, *A Famous Western Jurist, Native of Somerset*, 5 SOMERSET COUNTY HIST. Q. 1 (1916); William W. Thornton, *Life of Isaac Blackford* 2 (unpublished manuscript, on file with the Indiana State Library, Manuscript Collection S1312) [hereinafter Thornton, *Blackford*].

Gabriel Ford.⁶ For reasons undocumented, Blackford heard the call of the west and decided to migrate.⁷

Varied references recount a popular, but most likely apocryphal, tale of Blackford's journey west. According to the story, Blackford, unable to pay for a stagecoach, walked to Olean Pointe, Pennsylvania, on the Allegheny River and then navigated west on a crude flat-board raft.⁸ In light of his social position and character, it is more likely that Blackford traveled by horseback.⁹ Regardless of his manner of travel, Blackford arrived in Indiana in approximately 1812.

At the time of his arrival, the population in the Indiana territories numbered only twenty-five thousand.¹⁰ Corydon was described as a "tiny huddle of log cabins in the midst of the sea of primeval forest."¹¹ The total territorial tax levy did not exceed \$2000.¹²

Blackford first took a job as a clerk in the bank at Vevay. This position ended when fraud and mismanagement, which it is suggested that Blackford uncovered,¹³ led the bank to failure. This experience left Blackford with a skeptical view of banks that would shape his financial habits throughout his life.¹⁴ For a time, Blackford worked in Salem, Indiana, as Washington County's first clerk and

6. Honeyman, *supra* note 5, at 5.

7. Aside from court related papers, only one document drafted by Blackford remains in existence. Consequently, the author relied upon biographical sketches and second hand reports such as those appearing in contemporary newspapers. Unfortunately, these sources rely primarily upon one another, providing little or no source attribution. Author and reader are, to a great extent, left to surmise and suppose about much of Blackford's character and motivations. See *infra* note 28 and accompanying text.

8. Thornton, *Blackford*, *supra* note 5, at 4; *Judge Blackford, A Sketch of his Life and Character*, INDIANAPOLIS NEWS, Feb. 21, 1881 in 1 COTTMAN, INDIANA SCRAPBOOK COLLECTION 9 [hereinafter COTTMAN].

9. Honeyman, *supra* note 5, at 5. In contrast to current practice, the press at that time lionized popular figures in public life. Descriptions of their person, attributes and work bordered on the excessive. Particularly apparent in these 19th century descriptions was a tendency to emphasize, or possibly create in their subjects characteristics admired by the average man. In Indiana, for example, descriptions emphasized rugged frontierism.

10. Thornton, *Blackford*, *supra* note 5, at 4.

11. Honeyman, *supra* note 5, at 6. The author of this article quotes at length from an "Indianapolis clipping" in describing Corydon:

In the lanes of Corydon the adventurous sons of aristocratic Virginia rubbed cloth elbows with the buckskin clad trapper, brown and silent as the Indiana himself Land was plentiful. Money was little needed. Business was a system of trade and barter. English shillings and Spanish dollars passed current; the merchant who made change chopped the silver coin into pieces and weighed each segment; justice was swift and salutary; lashes on the bare back were frequent; Judges held court on fallen logs in the midst of the unbroken forest. . . .

12. Thornton, *Blackford*, *supra* note 5, at 4.

13. *Id.*

14. *Id.*; Thornton, *Indiana Blackstone*, *supra* note 3, at 319.

recorder.¹⁵ Blackford is alleged to have remarked that his chief duty was to “record marks on cattle which strayed at large in the absence of stock enclosures.”¹⁶

In 1813, Blackford was elected Clerk of the Territorial Legislature which convened in Corydon.¹⁷ He resigned this position on September 14, 1815, after being appointed President Judge of the First Judicial Circuit.¹⁸ The life of a circuit judge was lonely, difficult and sometimes dangerous. Circuit judges, often accompanied by the attorneys who also rode the circuit between developing towns and burghs, spent the year crossing the state’s terrain and holding court for a few days, as needed, before moving on to the next town.¹⁹

Blackford was not long for the rigors of circuit riding; he resigned his position in 1816 and returned to Vincennes to resume legal practice and to campaign for a seat in the state’s first constitutional legislature.²⁰ In 1817, he was elected Representative from Knox County and upon arriving in Corydon was soundly elected Speaker.²¹ It appears that his brief stint as Speaker was uneventful.

As Blackford convened the state’s first House of Representatives, Indiana’s first supreme court justices entered office and began creating Indiana’s judicial legacy.²² Justices James Scott, Jesse L. Holman and John Johnson opened the

15. Thornton, *Indiana Blackstone*, *supra* note 3, at 319.

16. Honeyman, *supra* note 5, at 6-7.

17. *Id.* at 7.

18. Thornton, *Indiana Blackstone*, *supra* note 3, at 320.

19. See 1 MONKS, *supra* note 1, at 8-10, for a thorough description of the life and challenges of the circuit riders.

20. Thornton, *Indiana Blackstone*, *supra* note 3, at 320.

21. Honeyman, *supra* note 5, at 7; Thornton, *Blackford*, *supra* note 5, at 5.

22. In late 1816, the legislature enacted a statute “organizing the supreme court and regulating the practice therein.” Act of Dec. 23, 1816, ch. 1, 1816 Ind. Acts 3 (superseded). This statute, among other things, defined the supreme court jurisdiction. *Id.* § 7 at 5. However, the legislature was not free to restrict the court’s jurisdiction in a way “repugnant to this constitution . . .” IND. CONST. of 1816, art. V, § 2. Generally, the supreme court’s jurisdiction extended to all judgments and decrees given by an inferior court of record in the state. Act of Dec. 23, 1816, ch. 1, §§ 7, 13, 1816 Ind. Acts 3, 5-6 (superseded).

Some of the legislature’s regulation of supreme court practice would sound strange to a modern reader. There was no right to appeal a criminal case to the supreme court. *Id.* Criminal cases only made their way to the supreme court on a common law writ of error. See, e.g., *Wynn v. State*, 1 Blackf. 28 (Ind. 1818). A provision of the 1816 Constitution gave the legislature the power to give the supreme court original jurisdiction in certain cases. IND. CONST. of 1816, art. V, § 2. Where the court had original jurisdiction or where it could review the facts on appeal, it had the power to summon witness, impanel juries and determine the facts in the same manner as a trial court. Act of Dec. 23, 1816, ch. 1, § 8, 1816 Ind. Acts 3, 5 (superseded).

Other provisions would sound familiar to a modern reader. An ordinary writ of error (i.e., a common law appeal) did not act as a supersedeas (i.e., did not stay the execution of the judgment) in criminal cases. *Id.* § 7 at 5. However, the court, in its discretion, could issue a supersedeas. *Id.* § 15 at 7. Also, an appeal could be sought only from final judgment that equaled or exceeded fifty

court's inaugural session on May 5, 1817.²³ After issuing two opinions, both holding that the litigants had failed to perfect their appeals, the court retired.²⁴ A few weeks later, Justice Johnson passed away. Governor Jennings again had the opportunity to appoint a judge. He would call upon Blackford.

The exact nature of the relationship between Jennings and Blackford is uncertain. The two men were linked by their heritage. They came from neighboring towns in New Jersey, arriving in Indiana only two years apart.²⁵ It can be fairly speculated that even if they were not acquainted before they departed New Jersey, this common heritage advanced their association once in Indiana. The two also shared a common political philosophy that led them to side together in a controversial fight.²⁶

Blackford began his political life as a member of the Whig Party.²⁷ But unlike prominent members of the party, he strongly opposed slavery and allied himself with Jennings, who led the Free State Party.²⁸ So strong was his opposition to the institution of slavery that when Governor Harrison was a candidate for President on the Whig ticket in 1836, Blackford, who blamed Harrison for the effort to make Indiana a slave territory, openly refused to support Harrison and changed his

dollars or appertained to a freehold franchise. *Id.* § 14 at 6-7. The fifty-dollar requirement survives today. IND. CODE § 33-3-2-4 (1993). Once an appeal was made to the supreme court, the transcript had to follow within thirty days. Act of Dec. 23, 1816, ch. 1, § 7, 1816 Ind. Acts 3, 7 (superseded). For a discussion of the supreme court's jurisdiction, see 1 MONKS, *supra* note 1, at 178-79.

Interestingly, prior to assuming office, judges were required to take two oaths: one to uphold the constitution and one to prohibit them from dueling. Act of Jan. 3, 1817, ch. 39, §§ 1, 3, 1817 Ind. Acts 180, 180-81 (superseded); Thornton, *Indiana Blackstone*, *supra* note 3, at 321.

23. Justices Scott and Johnson served as influential figures on the Judiciary Committee of the Indiana Constitutional Convention. 1 MONKS, *supra* note 1, at 176. Holman was the third member on the inaugural bench. *Id.*

These appointments appear to have been the result of a masterful political compromise. James Noble, William Hendricks and Jonathan Jennings were generally regarded as the most powerful men in the state in 1816. It is speculated that the three worked out a compromise at the constitutional convention: Jennings became governor; Hendricks, a congressman; Noble, a United States Senator. When it came to the appointment to the court, each chose one man. Jennings selected his friend and neighbor James Scott, Noble choose his friend and neighbor Jesse L. Holman, and Hendricks chose John Johnson from Vincennes. 1 MONKS, *supra* note 1, at 183-84.

24. 1 *id.* at 181.

25. 1 *id.* at 187.

26. 1 *id.*

27. Thornton, *Indiana Blackstone*, *supra* note 3, at 322.

28. WILLIAM W. WOOLLEN, BIOGRAPHICAL AND HISTORICAL SKETCHES OF EARLY INDIANA 350 (Indianapolis, Hammond & Co. 1883). In fact, the only known remaining document produced by Blackford, other than those dealing with court business, is the manuscript of an anti-slavery speech given by Blackford in 1829 to the Indiana Colonization Society, the organization which was to become the Indiana Historical Society. (Document on file with the Indiana State Library, manuscript collection *in* INDIANA PAMPHLETS: ADDRESSES (Indiana State Library ed., 1900)).

alliance and became a member of the Democratic Party.²⁹ He remained a Democrat for the rest of his life.³⁰

Blackford may have offered an additional appeal to Jennings. Some evidence suggests that Blackford was generally viewed as either outside or above political partisanship.³¹ Blackford was reappointed to his seat by governors of different parties five times, despite the fact that on at least two occasions, his colleagues were removed for what were generally regarded as purely political reasons.³² Blackford was generally well regarded by his peers. Jennings was thus able to forward a well-liked candidate respected for his abilities, who apparently was not a political liability.

The tale commonly repeated about Blackford's appointment provides another example of the fanciful tales surrounding popular figures.³³ Blackford attended Justice Johnson's funeral. Though it began as a courtesy, Blackford's visit turned out to be one of the most significant of his life. According to the popularly repeated versions of events, Blackford walked with the other mourners to Johnson's grave. Governor Jennings took Blackford by the arm and, as the two walked together, Jennings revealed his intent to nominate Blackford as Johnson's successor.³⁴ The surprise rendered the young representative dumbstruck. After recovering, he begged the Governor to reconsider and appoint another with more experience and intellect.³⁵ Ignoring these pleas, the Governor forwarded Blackford's name to the senate for approval.

This charming tale may contain at least some grain of truth. At the time of his appointment, Blackford, only thirty-one years old, had little legal experience compared to many of his peers. By all accounts a retiring man, he may have been intimidated by the thought of presiding over the group of colorful characters who populated the state's young bar.

It is unlikely, however, that this fear would have overridden Blackford's known ambition. Blackford, after all, was an inveterate officeholder.³⁶ In addition to the various political positions sought by Blackford prior to obtaining his supreme court seat, he sought or was nominated for several political offices including governor, state senator and, on two occasions, U.S. Congress.³⁷ Despite some close votes, he never succeeded in obtaining another office. Though respected, Blackford lacked political skill. Additionally, Blackford's personality,

29. *Id.* at 350-51.

30. Honeyman, *supra* note 5, at 13.

31. 1 COTTMAN, *supra* note 8, at 10.

32. *Id.* at 11.

33. Honeyman, *supra* note 5, at 7; Thornton, *Blackford*, *supra* note 5, at 5; 1 COTTMAN, *supra* note 8, at 13.

34. Honeyman, *supra* note 5, at 7.

35. Thornton, *Blackford*, *supra* note 5, at 5.

36. 1 MONKS, *supra* note 1, at 187.

37. Honeyman, *supra* note 5, at 8; 1 MONKS, *supra* note 1, at 190; Thornton, *Blackford*, *supra* note 5, at 11. Some reports suggest that Blackford was nominated for many of these offices without his knowledge or consent. Honeyman, *supra* note 5, at 8.

particularly in his later years, was contrary to that needed for political success.

Though not without friends, Blackford was not sociable.³⁸ He was not active in any organization or church³⁹ and generally kept to himself and his work. Blackford was generally regarded as a man of the utmost integrity, devoted to his work beyond the norm.⁴⁰ Some colleagues and reports refer to him as being filled with “nervous energy.”⁴¹ He purportedly worked for days on end with virtually no sleep beyond that absolutely necessary. By all accounts, he was a recluse, often shutting himself away for what one commentator described as weeks on end in his tiny apartment in the governor’s mansion on what is now Monument Circle.⁴² He maintained a library of over 2000 volumes, very extensive for its day, and virtually all of these works were legal in nature.⁴³

Blackford was so devoted to his work that he regarded even dealing with his money as something of an annoyance.⁴⁴ Accounts of Blackford’s lifestyle indicate that he spent little of his annual salary, which ranged from \$700 to \$1500 over the course of his tenure.⁴⁵ Due to his prior experience with banks, he allegedly distrusted the institutions and refused to invest his money there. Periodically, he would fail to collect his salary for a year or more, instead allowing it to remain in the treasury to accumulate interest.⁴⁶ When he did claim his money, it typically went to purchase property.⁴⁷

For Blackford, his work was, in a somewhat literal sense, his life. Blackford took his seat as justice during the fall term of 1817 when he was thirty-one years old. During his tenure, he authored over 900 opinions, each drafted with the utmost care.⁴⁸ He pored over the record of the cases slowly and methodically. Numerous additional hours were spent researching the law and drafting and

38. He had, for a brief period, been married to Caroline McDonald, daughter of his first employer, Col. George McDonald. This union ended after only fifteen months when his bride died in childbirth. The marriage had, by popular accounts, been unhappy. Honeyman, *supra* note 5, at 10. His wife purportedly enjoyed the social life, including the attention of male friends. The child produced by this union died at a tender age as well. *Id.*

39. WOOLLEN, *supra* note 28, at 352.

40. 1 COTTMAN, *supra* note 8, at 11.

41. Honeyman, *supra* note 5, at 13.

42. *Id.* This room was located in the same building as the court’s chambers. Thornton, *Indiana Blackstone*, *supra* note 3, at 322.

43. 1 MONKS, *supra* note 1, at 191.

44. 1 COTTMAN, *supra* note 8, at 12.

45. Honeyman, *supra* note 5, at 11.

46. *Id.* at 10; 1 MONKS, *supra* note 1, at 192.

47. Blackford made numerous, shrewd real estate purchases in Indianapolis and Evansville. These lands were developed and used as rental properties. 1 COTTMAN, *supra* note 8, at 12. The income from these properties as well, as from the sale of the Blackford reports, generated a handsome sum. At Blackford’s death, his estate was valued at approximately \$250,000. Honeyman, *supra* note 5, at 11; Thornton, *Indiana Blackstone*, *supra* note 3, at 327.

48. See 1 MONKS, *supra* note 1, at 210-244 (compiling a listing of the Indiana Supreme Court docket and the authors of the opinions, 1816-46).

redrafting his opinion.

Blackford was a great aficionado of Britain's common law. According to one of Blackford's early biographers,

[a]n English precedent with him was of more value than an original line of reasoning. His saving trait was the accurate application of the principles of the law to the facts as his untiring research revealed them to him. Without the power to make this application, his great desire to be accurate, and his patience in research, he would have failed as a judge.⁴⁹

Blackford's real acclaim, and his greatest contribution to the development of this state's jurisprudence and reputation, came through his work as the first reporter of Indiana decisions. Blackford voluntarily took on the task of accumulating and publishing those opinions of the court which he believed significant. He started the work in 1820. The first of the eight volumes published by Blackford appeared in 1830 and the last in 1850. In a preface to the first volume Blackford explained:

This volume of Reports, containing the decisions of the Supreme Court of the State during the first ten years of the government, is respectfully submitted to the Public.

The adjudications of the Court, constituting a part of the law of the country, should be generally known; and it is hoped that their publications will be satisfactory and useful. It is not anticipated that the work will be found free from imperfections. The Reporter, however, has spared no exertion to render it accurate and acceptable; and he confides it, with cheerfulness, to the liberality of his fellow-citizens.

It was thought advisable to preserve this volume, as much as possible, from any thing [sic] that might be considered superfluous. With the approbation of the other members of the Court, therefore, some of the cases have been abbreviated, and a few others, that have been overruled or were otherwise unimportant, have been omitted.

The Reporter has subjoined a few notes to some of the cases, with a hope that the references maybe [sic] a convenience to the student, in his investigation of subjects connected with the text.⁵⁰

Unlike current reporters—compilations of every opinion deemed publishable by the appropriate court presented in the form in which it was handed down—Blackford's reports were, in every sense, his own. He selected the decisions that would appear.⁵¹ He edited the opinions, appending explanatory notes or even changing the text of the opinion itself.⁵² No record of objection to this practice exists, suggesting in part that Blackford, true to his reputation, took pains to ensure that his edited versions of the opinions maintained the spirit and

49. Thornton, *Blackford*, *supra* note 5, at 11; *see also* 1 MONKS, *supra* note 1, at 190.

50. 1 BLACKFORD'S REPORTS at iii (Indianapolis, Bowen-Merrill Co. 2d. ed., 1891).

51. 1 MONKS, *supra* note 1, at 191.

52. Thornton, *Blackford*, *supra* note 5, at 6.

letter of the author's intentions.

By all accounts, the pains Blackford took to ensure accuracy in his reports were extraordinary. He wrote and edited tirelessly, a drive for perfection bordering on the manic. Blackford routinely delayed publication of his volumes to correct minor, even trivial errors. He paid significant sums to his printer to delay printing or to re-run the printing of volumes.⁵³ During the publication of the eighth volume, the printing house was held up for three days to allow him to determine the orthography of the word "jenny," a female ass.⁵⁴ Printing of this addition took over eighteen months and cost Blackford over \$1100 in delay fees to the printer.⁵⁵ On one occasion, a signature was allegedly printed four times before he gave approval to it.⁵⁶ It is said that he never made use of editorial marks, preferring instead to rewrite the entire page.⁵⁷

Blackford kept drafts of works in progress in the court's library. Alongside these drafts, he left blank paper for anyone to note errors located. A reward was offered for such finds.⁵⁸ The greatest reward for editing prowess likely went to Albert G. Porter. Porter noted that one of the drafts contained the word "optionary," but no such word existed.⁵⁹ Several years later, Porter found himself surprised upon being appointed reporter of the supreme court.⁶⁰ After receiving the appointment, Porter paid a call upon the governor to thank him. The governor informed Porter that his position was secured upon the urging of Justice Blackford.⁶¹ As a U.S. Congressman, Porter would eventually pay tribute to the man who secured Porter's first job in a speech given at a meeting of the Washington, D.C. bar.⁶²

Blackford's careful work in completing the reporters led to his wide reputation. Within the state, "people little learned in the machinery of government regarded him as the maker of the law, always quoting him in place of the statutes."⁶³ Chancellor Kent observed that the reporters were "replete with extensive and accurate law-learning, the notes of the learned reporter annexed to the cases being especially valuable."⁶⁴ Washington Irving, then serving as secretary to the delegation to the Court of St. James, purportedly wrote that he was often asked of the "author whose name is already quite familiar at Westminster."⁶⁵ Another contemporary said that the reports "have the reputation of being among

53. Honeyman, *supra* note 5, at 12.

54. 1 COTTMAN, *supra* note 8, at 10.

55. Thornton, *Blackford*, *supra* note 5, at 7.

56. *Id.* at 6.

57. 1 COTTMAN, *supra* note 8, at 10.

58. Honeyman, *supra* note 5, at 12; Thornton, *Blackford*, *supra* note 5, at 7.

59. Thornton, *Blackford*, *supra* note 5, at 7.

60. *Id.*

61. *Id.*

62. 1 MONKS, *supra* note 1, at 192.

63. 1 COTTMAN, *supra* note 8, at 9.

64. Thornton, *Indiana Blackstone*, *supra* note 3, at 325.

65. *Id.*

[sic] the best American reports” and that “[i]n Indiana he was the pioneer in establishing the common law practice, and throughout the West he was the most eminent authority on common law practice”⁶⁶

However, publication of the volumes was not without controversy. Blackford’s slavish devotion to the publication’s accuracy slowed the business of the court. Critics claimed that he spent so much time on the reports that the court was over two years behind in hearing cases.⁶⁷ His work on the reports affected not only the number of opinions that he was able to issue but also the total number of opinions issued by the court as a whole. For a time, the court maintained the custom of each justice preparing an equal number of decisions.⁶⁸ Therefore, when one justice finished the case assigned to him, he waited until his associates had reported before taking up another. Under this arrangement, Blackford was always last to report. It is said that Justice Dewey’s great love of literature originated from the time that he spent waiting for Blackford to catch up.⁶⁹

Even the members of the bar were alleged to have used Blackford’s fastidiousness to their advantage. According to one story, attorney Samuel Judah hoped to delay the issuance of a decision in a case involving his client until the next term.⁷⁰ He approached Blackford and questioned the spelling of a word that he knew would be in the opinion. Blackford spent two days seeking the correct spelling of the word, which was enough time to allow the court to adjourn. The opinion was carried over to the next term.⁷¹ Blackford’s plodding pace eventually damaged his reputation as people began to complain that he could no longer work at a speed necessary to allow the court to address its business in a timely fashion.⁷²

Blackford’s monetary gain from the publication of his reports caused a greater fury. Blackford’s critics felt that he was inappropriately reaping significant financial reward while impeding the business of the court.⁷³ Undoubtedly, knowledge of Blackford’s extensive real estate holdings and his peculiar method of money management added fuel to this fire.⁷⁴ This criticism, in part, led the delegates to the constitutional convention to create the position of court reporter.⁷⁵ Individual judges would no longer be able to produce reporters on their own time and for profit.⁷⁶

66. Honeyman, *supra* note 5, at 11.

67. Thornton, *Indiana Blackstone*, *supra* note 3, at 324; 1 MONKS, *supra* note 1, at 191.

68. 1 COTTMAN, *supra* note 8, at 11.

69. *Id.*

70. Thornton, *Indiana Blackstone*, *supra* note 3, at 326.

71. *Id.*

72. 1 MONKS, *supra* note 1, at 191.

73. *Id.*

74. One source estimates that Blackford’s average salary of \$1000 a year plus the proceeds from his reports totaled no more than \$50,000 over the course of his career. Honeyman, *supra* note 5, at 11; 1 MONKS, *supra* note 1, at 192.

75. IND. CONST. art. VII, § 6 (as adopted 1851) (amended 1970).

76. *Id.*

A second change brought by the 1851 Constitution⁷⁷ had an even greater effect on Blackford. Justices were no longer chosen by gubernatorial appointment but were instead selected by popular vote.⁷⁸ Blackford subsequently lost his seat when Samuel Perkins was slated in the state's Democratic convention.⁷⁹ Ironically, at least some of the sentiment that caused the voters to oust him was likely caused by the very thing which garnered him so much acclaim—the Blackford Reports. It was generally felt that a younger man, one more able to keep up a pace necessary to complete the business of the court, was needed. Certainly, Blackford's own introverted, eccentric personality and his inability to play the game of politics did not help his cause. Blackford would happily have accepted the newly created position of court reporter. He was, however, denied this as well.⁸⁰

Blackford was devastated by his defeat. He told colleagues and friends that he would prefer to stay on and work for free rather than be turned out, but his offer was refused.⁸¹ For a brief time Blackford set up a law office.⁸² Again, his shyness and fear of being incorrect, as well as his long tenure on the bench, left him unfit for the impromptu and public life before the bar. Blackford was totally unfamiliar with the rules of court and of evidence;⁸³ he was timid and embarrassed as a public speaker.⁸⁴ Many sources recount a story of Blackford's first appearance before a jury which so humiliated him that he refused to take further work requiring appearances in court.⁸⁵

Blackford's likely difficult time in limbo ended in 1855 upon the creation of the U.S. Court of Claims. President Franklin K. Pierce appointed Blackford as one of its first judges.⁸⁶ Blackford moved to Washington D.C. and sat as a court of claims judge until his death in the last hour of 1859. After public services in the Statehouse, he was laid to rest at Crown Hill cemetery in Indianapolis. His grave marker reads: "The honors thus conferred were the just rewards of an industry that never wearied, of an integrity that was never questioned."⁸⁷

77. *Id.* § 3 (as adopted 1851) (amended 1970).

78. Among members of the public, there was a strong opinion that the appointments of at least two justices had been made based solely on political considerations. 1 MONKS, *supra* note 1, at 181.

79. Thornton, *Indiana Blackstone*, *supra* note 3, at 323.

80. 1 COTTMAN, *supra* note 8, at 11.

81. Thornton, *Indiana Blackstone*, *supra* note 3, at 323.

82. *Id.*

83. 1 COTTMAN, *supra* note 8, at 11.

84. Thornton, *Blackford*, *supra* note 5, at 11.

85. Honeyman, *supra* note 5, at 8.

86. 1 MONKS, *supra* note 1, at 110.

87. 1 *id.* at 14.

BIOGRAPHICAL SKETCHES OF INDIANA SUPREME COURT JUSTICES

MINDE C. BROWNING*
RICHARD HUMPHREY**
BRUCE KLEINSCHMIDT***

ACHOR, HAROLD EDWARD
(Eighty-fourth Justice)

Justice Achor was born November 16, 1907, in Coffeetown, Kansas, and died February 5, 1967, in Anderson, Indiana.¹

He completed public school in Atwood, Indiana, and continued his education at Indiana Central College, from which he graduated in 1928.² He earned a law degree at Indiana University in 1931.³

Justice Achor began the practice of law in 1931, as a member of the firm of Achor & Peck in Anderson, Indiana.⁴ He continued in private practice until 1942, when he was elected Madison Superior Court Judge, where he served two terms.⁵ "In 1950, he was elected to the Indiana Appellate Court for a four-year term."⁶ He left his Indiana appellate court seat in 1955 to serve on the Indiana Supreme Court.⁷ Due to poor health, he resigned from the Indiana Supreme Court in 1966.⁸

In addition to his legal career, Justice Achor also taught speech and political science at Anderson College from 1932 to 1937.⁹ He was also a member of the Board of Governors of the Associated Colleges of Indiana and served on the Board of Trustees of Anderson College.¹⁰

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1. *Obituaries*, RES GESTAE, Feb. 1967, at 22, 22.

2. *Former Supreme Court Justice H.E. Achor Dies*, INDIANAPOLIS STAR, Feb. 6, 1967, at 11, reprinted in 66 INDIANA BIOGRAPHY SERIES 104 (Indiana State Library).

3. *Obituaries*, *supra* note 1, at 22; Russell W. Smith & Charles W. Cook, *In Memoriam*, 246 INDIANA REPORTS xlvii, xlvii (1968) [hereinafter *Achor Memoriam*].

4. 66 INDIANA BIOGRAPHY SERIES, *supra* note 2, at 104.

5. *Obituaries*, *supra* note 1, at 22; *Achor Memoriam*, *supra* note 3, at xlvii.

6. *Obituaries*, *supra* note 1, at 22.

7. 66 INDIANA BIOGRAPHY SERIES, *supra* note 2, at 104.

8. *Achor Memoriam*, *supra* note 3, at xlvii.

9. *Obituaries*, *supra* note 1, at 22.

10. *Achor Memoriam*, *supra* note 3, at xlvii.

ARTERBURN, NORMAN FRANK
(Eighty-eighth Justice)

Justice Arterburn was born May 13, 1902, in Bicknell, Indiana, and died February 10, 1979, in Florida.¹¹

In 1923 he received an A.B. from Indiana University and was admitted to practice.¹² In 1926, he received a J.D. from the University of Chicago.¹³

He practiced law in Vincennes from 1927 to 1955.¹⁴ Justice Arterburn was appointed to the Indiana Supreme Court in 1955.¹⁵ He first served as a chief justice at a time when that title was rotated among the justices.¹⁶ However, when the Indiana Constitution was amended in 1970 to change the system, Justice Arterburn was selected as the court's first permanent chief justice, and served as chief justice until 1974. He served his last three years, 1974-1977, as a justice.¹⁷

He taught at Washburn College in 1926 and 1927, and at Indiana University in 1949, and in 1953-54. He was also a member of the Indiana Board of Law Examiners from 1938 to 1944.¹⁸

BAKER, FRANCIS E.
(Forty-ninth Justice)

Justice Baker was born October 20, 1860, in Goshen, Indiana, and died March 15, 1924.¹⁹ He attended Indiana University from 1876 to 1878, but graduated from the University of Michigan in 1882 where he would later receive a Doctor of Law (LL.D.) in 1914.²⁰ He went to Goshen, Indiana to read law with his father and uncle and was admitted to the Indiana bar in 1885.²¹

Many of his relatives were members of the legal profession including his father-in-law and his mother's brother.²² His father, John H. Baker, was a U.S. District Court Judge and two of his uncles served on the Indiana Supreme Court (the Honorable James S. Frazer (the 18th Justice) and the Honorable Joseph A. S. Mitchell (the 35th Justice)).²³ Justice Francis E. Baker served on the Indiana

11. 7 WHO WAS WHO IN AMERICA 18 (Marquis, 1st ed. 1981) [hereinafter WHO WAS WHO].

12. 7 *id.*

13. 7 *id.*

14. 7 *id.*

15. *Obituaries*, 23 RES GESTAE 145, 145 (1979).

16. *Id.*

17. *Id.*

18. *Id.*

19. 4 JACOB PIATT DUNN, INDIANA AND INDIANANS: A HISTORY OF THE ABORIGINAL AND TERRITORIAL INDIANA AND THE CENTURY OF STATEHOOD 1771 (1991).

20. MEN OF PROGRESS, INDIANA 108-09 (Will Cumbach & J.B. Maynard eds., Indianapolis, Indianapolis Sentinel Co. 1899).

21. *Id.*

22. *Id.*

23. *Id.*

Supreme Court from 1899 until January 5, 1902 when he was appointed a U.S. Circuit Court Judge.²⁴

BERKSHIRE, JOHN G.
(Thirty-eighth Justice)

Justice Berkshire was born in 1832 in Ohio County, Indiana, and died February 19, 1891, in North Vernon, Indiana.²⁵

He received a common school education in Rising Sun, Indiana and continued his studies at the law school at Asbury University, from which he graduated in 1857.²⁶

Immediately after his graduation from law school, he moved to Versailles, Indiana and opened a law office, which he occupied until 1864.²⁷ He then served from 1864 to 1882 as judge of the First and Sixth Indiana judicial circuits.²⁸ After losing his bid for re-election in 1882, Justice Berkshire moved to North Vernon, Indiana, and again opened a private legal practice.²⁹ He continued there until 1888, when he was elected to the Indiana Supreme Court.³⁰ He served on the court from January 17, 1889, until his death in 1891.³¹

BIDDLE, HORACE PORTER
(Twenty-sixth Justice)

Justice Biddle was born on March 24, 1811, in Hocking County, Ohio, and died May 13, 1900, in Logansport, Indiana.³²

Justice Biddle was an exceptional scholar and voracious reader.³³ He did not begin to study law until age twenty-five.³⁴ His intellect gained him the attention of U.S. Senator Thomas Ewing of Ohio, who used his influence to help Biddle obtain an appointment at a prominent Ohio law firm.³⁵

He was admitted to the Ohio bar at Cincinnati and to the Federal bar in 1839.³⁶ In that same year, he began his own law practice in Logansport, Indiana, which he continued until 1846, when he was elected judge of the Eighth Circuit.³⁷ He served there until he resigned in 1852 to make an unsuccessful bid for an Indiana

24. 4 DUNN, *supra* note 19, at 1771.

25. 1 LEANDER J. MONKS, COURTS AND LAWYERS OF INDIANA 275 (1916).

26. 1 *id.*

27. 1 *id.*

28. 1 *id.*

29. 1 *id.*

30. 1 *id.*

31. 1 *id.*

32. 1 *id.* at 260.

33. 1 *id.*

34. 1 *id.* at 260-61.

35. 1 *id.* at 261.

36. 1 *id.*

37. 1 *id.*

state congressional seat.³⁸ He was re-elected judge of the Eighth Circuit in 1860, and served until the end of his second term in 1871.³⁹

In 1857, Justice Stuart resigned from the Indiana Supreme Court seat, indicating that the resignation would be effective the first Monday in January 1858.⁴⁰ The Republican party assumed that the seat was vacant and nominated Biddle, who was elected by a considerable majority.⁴¹ Governor Willard, a Democrat, believed that Justice Stuart's term ended in 1859, and he refused to commission Biddle, instead appointing James Worden to the bench.⁴² The Indiana Supreme Court (all Democrats) heard the case on the strength of mandamus proceedings which Biddle brought against the governor.⁴³ The case was decided in the governor's favor, and James Worden was appointed to the bench.⁴⁴ In 1872, the Democratic party nominated Biddle for an Indiana Supreme Court seat, and he won the election.⁴⁵ His term on the Indiana Supreme Court was from January 4, 1875 to January 3, 1881.⁴⁶

Although Justice Biddle gained great recognition as an attorney and as an Indiana Supreme Court Justice, he is probably more widely known for his literary work. His first published work was a collection of poetry titled, *A Few Poems*, which received glowing reviews from the great poets of the time.⁴⁷

By far, Justice Biddle's greatest accomplishments were in the field of music. He wrote many works about music theory including a highly popular treatise titled *The Musical Scale*.⁴⁸ He invented an instrument called a "tetrachord" and subsequently published a book about its invention.⁴⁹ And he wrote a review of Tyndal's theories of sound which was accorded a high rank not only in this country, but also in England.⁵⁰ Among Biddle's many writings the following titles should be mentioned: *Elements of Knowledge*; *A Scrapbook of Poems*; *The Amatories: by an Amateur*; *A Discourse on Art*; *The Definition of Poetry*; *The Analysis of Rhyme*; *Russian Literature*; *America's Boyhood*.⁵¹

38. 1 *id.*

39. 1 *id.* at 262.

40. 1 *id.* at 261.

41. 1 *id.*

42. 1 *id.*

43. 1 *id.*

44. 1 *id.*

45. 1 *id.* at 262.

46. 1 *id.*

47. 1 *id.*

48. 1 *id.*

49. 1 *id.*

50. 1 *id.* at 262-63.

51. 1 *id.* at 263.

BLACKFORD, ISAAC NEWTON
(Fourth Justice)

Justice Blackford was born November 6, 1786, in Bound Brook, Somerset County, New Jersey,⁵² and died December 31, 1859, in Washington, D.C.⁵³ He graduated from Princeton University in 1806.⁵⁴

As the clerk and recorder in Washington County, Indiana, in 1814, his primary responsibility was to register brands for stocks.⁵⁵ He was elected principal clerk for the Territorial House of Representatives in 1813, but resigned when he was appointed a judge in the 1st Circuit Territorial Court, where he served from 1814 to 1815.⁵⁶ He was an Indiana State Representative from 1816 to 1817 and chosen Speaker during his term.⁵⁷ In 1817, Blackford was appointed to the Indiana Supreme Court where he served until 1853.⁵⁸ After several failed attempts at running for political office, he was appointed to the newly created U.S. Court of Claims in Washington, D.C., where he served from 1855 until his death in 1859.⁵⁹ He was a trustee for Indiana University from 1838 to 1841 and compiled the renowned *Blackford's Reports* (8 volumes 1830-1850).⁶⁰

BOBBITT, ARCHIE "ARCH" NEWTON
(Eighty-first Justice)

Justice Bobbitt was born on September 3, 1895, in Eckerty, Indiana, and died January 24, 1978, in Indianapolis.⁶¹ He attended Central Normal College at Danville and received an LL.B. from the Benjamin Harrison Law School in 1927.⁶² Bobbitt began his professional career as a school teacher and principal.⁶³ He was elected Crawford County Clerk in 1918, but resigned to join the Navy and to serve in World War I.⁶⁴ He later served as the Crawford County Auditor from 1921 to 1925 and as a gasoline tax collector from 1925 to 1929.⁶⁵ Bobbitt was

52. 1 *id.* at 187.

53. 1 *id.* at 190-91.

54. 1 *id.* at 188.

55. 1 BIOGRAPHICAL DIRECTORY OF THE INDIANA GENERAL ASSEMBLY 27 (Rebecca A. Shepherd et al. eds., 1980) [hereinafter BIOGRAPHICAL DIRECTORY].

56. 1 *id.*

57. 1 MONKS, *supra* note 25, at 189; 1 BIOGRAPHICAL DIRECTORY, *supra* note 55, at 27.

58. 1 BIOGRAPHICAL DIRECTORY, *supra* note 55, at 27.

59. 1 MONKS, *supra* note 25, at 190-91.

60. BURTON DOOR MYERS, TRUSTEES AND OFFICERS OF INDIANA UNIVERSITY 1820-1850, at 104, 106 (1951).

61. *In Memoriam*, 265 INDIANA REPORTS xxxvii, xxxvii (1978) [hereinafter *Bobbitt Memoriam*].

62. WHO'S WHO IN THE MIDWEST 91 (Marquis, 8th ed. 1954).

63. *Bobbitt Named City Attorney*, INDIANAPOLIS STAR, Dec. 6, 1942, at 1, reprinted in 24 INDIANA BIOGRAPHY SERIES, *supra* note 2, at 61.

64. *Bobbitt Memoriam*, *supra* note 61, at xxxvii.

65. WHO'S WHO IN THE MIDWEST, *supra* note 62, at 91.

elected to the post of State Auditor where he uncovered a gasoline bootlegging scheme and recovered evaded taxes.⁶⁶ In 1930, he returned to private practice, but returned to public office as an Indianapolis city attorney from 1943 to 1948, serving as the chief city attorney from 1945 to 1948.⁶⁷

Bobbitt was elected to serve on the Indiana Supreme Court and assumed office on January 1, 1951.⁶⁸ Because of court rules that rotated the chief justice position, he became chief justice the day he took his seat on the court.⁶⁹ He served on the court until he was defeated for re-election in 1963, by Justice Walter Myers, Jr.⁷⁰ He then returned to his former firm, Ruckelhaus, Bobbitt & O'Connor.⁷¹

BOEHM, THEODORE REED
(One hundred-fourth Justice)

Justice Boehm was born September 12, 1938, in Evanston, Illinois.⁷² He received an A.B. *summa cum laude* from Brown University in 1960.⁷³ He attended the University of Munich and then enrolled at Harvard University's School of Law, where he received a J.D. *magna cum laude* in 1963 and served as a law review editor.⁷⁴ After graduation, Boehm served as a law clerk to Chief Justice of the United States, Earl Warren and Associate Justices Stanley Reed and Harold Burton.⁷⁵

Upon completion of duties at the U.S. Supreme Court, Boehm returned to Indianapolis, where he practiced law with Baker & Daniels from 1964 to 1988.⁷⁶ In 1981, he was named the managing partner of the firm.⁷⁷ His work included the successful representation of Eli Lilly over the drug DES, representing Indiana Democrats in a high-profile reapportionment dispute in the U. S. Supreme Court,⁷⁸ and becoming significantly involved in promoting amateur sports, which included the 1982 U. S. Olympic Festival and the 1987 Pan Am Games.⁷⁹

66. INDIANA TODAY: A WORK FOR NEWSPAPER AND LIBRARY REFERENCE 269, 414 (C. Walter McCarty et al. eds., 1942).

67. *Bobbitt Memoriam*, *supra* note 61, at xxxvii.

68. *Id.*

69. *Id.* at xxxvii-xxxviii.

70. *Arch Bobbitt Was Supreme Court Justice*, INDIANAPOLIS NEWS, Jan. 25, 1978, at C3, reprinted in 86 INDIANA BIOGRAPHY SERIES, *supra* note 2, at 68.

71. *Bobbitt Memoriam*, *supra* note 61, at xxxviii.

72. WHO'S WHO IN AMERICAN LAW 79 (Marquis, 6th ed. 1989).

73. *Id.*

74. *Id.*

75. *Id.*

76. 7 MARTINDALE-HUBBELL LAW DIRECTORY IN104B (1996 ed.) [hereinafter MARTINDALE-HUBBELL].

77. Claudia Weinstein, *Calling the Plays at Baker & Daniels*, AMERICAN LAWYER, Apr. 1987, at 21, 21-22.

78. *Davis v. Bandemer*, 478 U.S. 109 (1986).

79. Weinstein, *supra* note 77, at 21-23.

Boehm left Baker & Daniels in 1988 to serve in positions with General Electric, first as General Counsel in Major Appliances and then in Aircraft Engines.⁸⁰ In 1991, he left General Electric and went to work at Eli Lilly, where he served as deputy general counsel until 1995.⁸¹ After leaving Eli Lilly, he returned to Baker & Daniels before being appointed to the Indiana Supreme Court on August 8, 1996.⁸²

BUSKIRK, SAMUEL HAMILTON
(Twenty-fourth Justice)

Justice Buskirk was born January 19, 1820, in New Albany, Indiana, and died on April 3, 1879, in Indianapolis.⁸³

He moved to Bloomington, Indiana, where he attended school and college, graduating from Indiana University in 1841.⁸⁴

In 1848, he began to practice law.⁸⁵ He served five terms in the Indiana House of Representatives and was named Speaker in 1862.⁸⁶ On January 3, 1875, he joined the Indiana Supreme Court and served until January 1877, before retiring in Indianapolis.⁸⁷

COFFEY, SILAS D.
(Thirty-sixth Justice)

Justice Coffey was born February 23, 1839, in Owen County, Indiana,⁸⁸ and died on March 6, 1904, in Brazil, Indiana.⁸⁹

He entered Indiana University in 1860, but withdrew when the Civil War erupted.⁹⁰ Yet the war did not stop his studies. He carried a copy of *Blackstone's Commentaries* with him.⁹¹

After the war Coffey returned home, studied law and opened an office in Bowling Green, Indiana, then the county seat of Clay County.⁹² Coffey was an

80. 7 MARTINDALE-HUBBELL, *supra* note 76, at IN104B.

81. 7 *id.*

82. Suzanne McBride, *Bayh Selects Local Attorney to Join Supreme Court; Theodore Boehm is a Political Ally of Governor's and Legal Observers Call Him a Spectacular Choice*, INDIANAPOLIS STAR, June 12, 1996, at A1.

83. 1 MONKS, *supra* note 25, at 258.

84. 1 *id.*

85. 1 *id.*

86. 1 *id.*

87. 1 BIOGRAPHICAL DIRECTORY, *supra* note 55, at 49.

88. 1 MONKS, *supra* note 25, at 274.

89. CHARLES W. TAYLOR, BENCH AND BAR OF INDIANA 708 (Indianapolis, Bench & Bar Publ. Co. 1895).

90. 1 MONKS, *supra* note 25, at 274.

91. TAYLOR, *supra* note 89, at 704.

92. 1 MONKS, *supra* note 25, at 275.

active participant in the Republican Party.⁹³ In 1881, he was named to the 13th Circuit Court bench where he stayed until he was elected to the Indiana Supreme Court.⁹⁴ He sat from January 7, 1889 until January 7, 1895.⁹⁵

COMBS, WILLIAM H.
(Thirty-second Justice)

Justice Combs was born July 17, 1808, in Brunswick, Maine.⁹⁶ His date and place of death are unknown.

He was educated in the public schools of Cincinnati, Ohio.⁹⁷ He moved to Connersville, Indiana in 1831, studied law, and was admitted to the Indiana bar in 1834.⁹⁸ On December 2, 1882, he was appointed to fill the vacancy on the Indiana Supreme Court created by the resignation of Justice Worden.⁹⁹ He served just one month when he was succeeded on January 1, 1883 by Justice Zollars.¹⁰⁰

COX, CHARLES ELBRIDGE
(Fifty-fifth Justice)

Justice Cox was born February 21, 1860 in Hamilton County, Indiana,¹⁰¹ and died February 3, 1936 in Indianapolis.¹⁰²

He attended common schools and began to study law in 1877 while clerking for Indiana Supreme Court Justice William E. Niblack (the 27th Justice).¹⁰³ In addition to serving as clerk for Justice Niblack, he also served as the librarian for the Indiana Supreme Court, a position he held from 1883 to 1889.¹⁰⁴ He was admitted to the Indiana bar in 1889 and began to practice law.¹⁰⁵ He served in a variety of public positions, including deputy prosecutor for Marion County from 1890 to 1894, city judge in Indianapolis from 1895 to 1899, and as an Indiana Supreme Court Justice from 1911 to 1917.¹⁰⁶

93. TAYLOR, *supra* note 89, at 53, 55, 711.

94. *Id.*

95. 1 MONKS, *supra* note 25, at 275.

96. 1 *id.* at 269.

97. 1 *id.*

98. 1 *id.*

99. 1 *id.*

100. 1 *id.*

101. 1 *id.* at 287.

102. Louis B. Ewbank et al., *In Memoriam*, 208 INDIANA REPORTS xxv, xxv (1936) [hereinafter *Cox Memoriam*].

103. 1 MONKS, *supra* note 25, at 288.

104. 1 *id.*

105. *Cox Memoriam*, *supra* note 102, at xxv.

106. *Id.*

DAILEY, JOSEPH S.
(Forty-fourth Justice)

Justice Dailey was born May 31, 1844, in Wells County, Indiana,¹⁰⁷ and died October 9, 1905, in Bluffton, Indiana.

He received his early education in the public schools of Bluffton, Indiana, and graduated from the Indiana University Law School in 1866.¹⁰⁸ After graduation he began a legal practice in Bluffton, Indiana, and, in the fall of that year, he was elected district attorney of the common pleas court.¹⁰⁹ In 1868, he won the election for prosecuting attorney of the 10th Indiana Judicial Circuit and served there until 1876.¹¹⁰ He served as a member of the Indiana State Legislature in 1879.¹¹¹ In 1888, Dailey was elected judge of the 28th Indiana Judicial Circuit, a position which he held until 1893, when he was appointed to the Indiana Supreme Court to fill the vacancy created by the resignation of Justice Olds.¹¹² His term on the Indiana Supreme Court bench was from July 25, 1893 to January 7, 1895.¹¹³

DAVISON, ANDREW
(Eleventh Justice)

Little recorded information is available regarding Andrew Davison, except that he was born September 15, 1800 in Franklin County, Pennsylvania,¹¹⁴ and died February 4, 1871 in Greensburg, Indiana.¹¹⁵

Justice Davison was educated at Jefferson College in Canonsburg, Pennsylvania.¹¹⁶ He then studied law, and came to Indiana in 1825 to establish his law practice.¹¹⁷ He was admitted to the Indiana bar at Greensburg on September 26, 1825 and began practice there. His service on the Indiana Supreme Court was from January 3, 1853 to January 2, 1865.¹¹⁸

107. 1 MONKS, *supra* note 25, at 280.

108. 1 *id.*

109. 1 *id.*

110. 1 *id.*

111. 1 *id.*

112. 1 *id.*

113. 1 *id.*

114. 1 *id.* at 247.

115. 1 BIOGRAPHICAL HISTORY OF EMINENT AND SELF-MADE MEN OF THE STATE OF INDIANA, at dist. 4: 17-18 (Cincinnati, Western Biographical Pub. Co. 1880).

116. 1 MONKS, *supra* note 25, at 247.

117. 1 *id.* at 247-48.

118. 1 *id.* at 248.

DEBRULER, ROGER O.
(Ninety-fifth Justice)

Justice DeBruler was born in Evansville, Indiana in 1934.¹¹⁹

He received an A.B. from Indiana University in 1958 and an LL.B in 1960 from Indiana University School of Law.¹²⁰ He was admitted to practice in Indiana in 1960 and served as Deputy City Prosecutor of Indianapolis from 1960 to 1963.¹²¹ He was appointed Steuben Circuit Court Judge in 1963 and elected to the same position in 1964.¹²² When Indiana Supreme Court Justice Mote died in office, Justice DeBruler was appointed as his successor.¹²³ The appointment came in late September, 1968 and because the Indiana Constitution provides that an appointment lasts until the next election, there was some controversy over whether the election should occur in 1968 or in 1970.¹²⁴ He was appointed through 1970 and was then elected to the Indiana Supreme Court for a six-year term.¹²⁵ He retired from the bench on August 8, 1996 having written 886 majority and 590 dissenting opinions.¹²⁶

DEWEY, CHARLES
(Seventh Justice)

Justice Dewey was born March 6, 1784, in Sheffield, Massachusetts, and died April 25, 1862, in Charlestown, Indiana.¹²⁷

He graduated from Williams College with high honors and received an honorary LL.D. from Indiana University in 1844.¹²⁸ He studied and practiced law in Massachusetts before coming to Indiana at age thirty-two.¹²⁹ He held many public offices, including Indiana State Representative from 1821 to 1822, U.S. District Attorney for Indiana from 1825 to 1829, Second Circuit Prosecuting Attorney from 1833 to 1836, and Indiana Supreme Court Justice from 1836 to 1847.¹³⁰ He ran twice unsuccessfully for both the U.S. House of Representatives

119. AMERICAN BENCH 901 (Marie T. Finn et al. eds., 8th ed. 1995); *Hon. Roger O. DeBruler Succeeds Hon. Donald R. Mote on Supreme Court*, RES GESTAE, Oct. 1968, at 17, 17.

120. AMERICAN BENCH, *supra* note 119, at 901.

121. *Id.*

122. *Hon. Roger O. DeBruler Succeeds Hon. Donald R. Mote on Supreme Court*, RES GESTAE, Oct. 1968, at 17, 17.

123. *Id.*

124. *Charges Fly in Court Hassle*, INDIANAPOLIS NEWS, Sept. 25, 1968, at 4; *Branigin Puts DeBruler on High Court*, INDIANAPOLIS NEWS, Sept. 30, 1968, at 1.

125. *Judicial Retention Subject of Bar Poll*, 30 RES GESTAE 109, 109 (1986).

126. Suzanne McBride, *Court Bids Adieu to Free Thinker*, INDIANAPOLIS STAR, Aug. 8, 1996, at D1.

127. 1 MONKS, *supra* note 25, at 198, 200.

128. MYERS, *supra* note 60, at 104.

129. WILLIAM W. WOOLEN, BIOGRAPHICAL AND HISTORICAL SKETCHES OF EARLY INDIANA 360 (Indianapolis, Hammond & Co. 1883).

130. 1 BIOGRAPHICAL DIRECTORY, *supra* note 55, at 100; *but see* 1 MONKS, *supra* note 25,

and the U.S. Senate.¹³¹ He was a trustee for Indiana University in 1820.¹³² In an era of state history when one would expect to find rough and rugged characters, Charles Dewey did not disappoint. Even in middle age, he was fond of wrestling and would engage his opponents in brawls.¹³³ As a lawyer, he was not discreet in his displeasure with judges.¹³⁴ On one occasion when he was displeased with the ruling of a court, he lost his patience, and after a verbal lashing, entreated the court with, “Now, damn you, fine me; send me to jail, too; you ought to if you have any respect for yourselves.”¹³⁵

DICKSON, BRENT E.
(One-hundredth Justice)

Justice Dickson was born July 18, 1941 in Hobart, Indiana.¹³⁶ He received an B.A. from Purdue University in 1964.¹³⁷ He earned a J.D. in the evening division of the Indiana University School of Law—Indianapolis in 1968 while working full-time as an insurance claims adjuster.¹³⁸ He practiced law in Lafayette from 1968 to 1985 and became the senior partner in the law firm of Dickson, Reiling, Teder & Withered.¹³⁹ He was appointed by Governor Robert D. Orr to replace retiring Indiana Supreme Court Justice Prentice W. Dixon.¹⁴⁰ The appointment began January 6, 1986, and he was retained by election in 1988.¹⁴¹ His current term expires December 31, 1998.¹⁴² His writings include: *The Effect of Statutory Prerequisites on Decision of Board of Zoning Appeals*; *Operation and Effect of Loan Receipts, Covenants-Not-To-Sue and Partial Settlements in Indiana*; *Jury Instructions on Appeal*.¹⁴³

DOWLING, ALEXANDER
(Forty-seventh Justice)

Justice Dowling was born December 19, 1839, in Hillsboro, Virginia,¹⁴⁴ and died December 11, 1917, in New Albany, Indiana.¹⁴⁵

at 199 (listing service as U.S. District Attorney from 1821 to 1829).

131. 1 BIOGRAPHICAL DIRECTORY, *supra* note 55, at 100.
132. 1 *id.*
133. 1 MONKS, *supra* note 25, at 200.
134. 1 *id.*
135. 1 *id.*
136. AMERICAN BENCH, *supra* note 119, at 901.
137. *Bar Polled on Judicial Retention*, 32 RES GESTAE 108, 108 (1988).
138. *Id.*
139. *Dickson Named to Top Court*, INDIANAPOLIS NEWS, Dec. 18, 1985, at 1.
140. *Dickson Installed as Justice*, 29 RES GESTAE 393, 393 (1986).
141. AMERICAN BENCH, *supra* note 119, at 902.
142. *Id.*
143. *Id.*
144. 1 MONKS, *supra* note 25, at 283.
145. 1 WHO WAS WHO 337 (Marquis 1943).

He received his early education in the New Albany public schools.¹⁴⁶ After completion of his formative education, he entered the law office of Otto & Davis and studied law there until he was admitted to the Indiana bar in 1858.¹⁴⁷ Between 1860 and 1868, he served two terms as prosecutor and city attorney for New Albany.¹⁴⁸ He was offered an appointment to the Indiana Supreme Court bench in 1891, but declined it.¹⁴⁹ He was later elected to an Indiana Supreme Court seat and served from January 2, 1899 to January 2, 1905.¹⁵⁰

DOWNEY, ALEXANDER CUMMINGS
(Twenty-third Justice)

Justice Downey was born September 10, 1817, near Cincinnati, Ohio,¹⁵¹ and died March 26, 1898, in Rising Sun, Indiana.¹⁵²

He received a public school education and attended the county seminary at Wilmington, Ohio.¹⁵³ After his graduation from the seminary, he studied law and was admitted to the Indiana bar in 1841.¹⁵⁴

He was appointed circuit judge by Governor Wright in 1850, elected to the office in 1851, and served until August 1858.¹⁵⁵

From 1854 to 1858, he chaired the law department of Asbury (now DePauw) University.¹⁵⁶ He received an honorary degree of Doctor of Laws from Asbury University in 1858 and the same recognition from Indiana University in 1871.¹⁵⁷ He was a member of the Indiana Senate from 1863 to 1865.¹⁵⁸ His Indiana Supreme Court term was from January 3, 1871 to January 3, 1877.¹⁵⁹ He became Dean of DePauw University Law School in 1884.¹⁶⁰

DRAPER, FLOYD S.
(Eighty-second Justice)

Justice Draper was born October 17, 1893, in Fulton, New York, and died

146. 1 MONKS, *supra* note 25, at 283.

147. 1 *id.*

148. 1 *id.*

149. 1 *id.*

150. 1 *id.*; but see 1 WHO WAS WHO, *supra* note 145, at 337 (listing Dowling's Indiana Supreme Court service as 1898-1904).

151. 1 MONKS, *supra* note 25, at 258.

152. 1 BIOGRAPHICAL DIRECTORY, *supra* note 55, at 105.

153. 1 MONKS, *supra* note 25, at 258.

154. 1 *id.*

155. 1 *id.*

156. 1 *id.*

157. 1 *id.*

158. 1 *id.*

159. 1 *id.*

160. 2 *id.* at 481.

March 20, 1980, in Bradenton, Florida.¹⁶¹

Justice Draper received his legal education at Valparaiso University Law School, where he graduated with honors in 1915.¹⁶² His first public service was in 1923 when he became chief deputy prosecutor for Lake County, Indiana.¹⁶³ In 1939, he served as city attorney of Gary, Indiana.¹⁶⁴ He was elected to serve on the Indiana Court of Appeals in 1942 and was re-elected in 1946.¹⁶⁵ His Indiana Supreme Court term was from January 2, 1951 to January 10, 1955.¹⁶⁶ He resigned from the court a year before the expiration of his term because of the poor health of his brother, Alfred P. Draper.¹⁶⁷ He retired from his legal practice in 1958, but accepted an appointment to the Lake County Criminal Court from Governor Handley in 1960.¹⁶⁸

ELLIOTT, JEHU TINDLE
(Nineteenth Justice)

Justice Elliott was born February 7, 1813, in Richmond, Indiana, and died February 12, 1876, in New Castle, Indiana.¹⁶⁹

He was not able to regularly attend local country schools and consequently taught himself enough to become a teacher.¹⁷⁰ He studied law with an attorney in Centerville and was admitted to the Indiana bar in 1833.¹⁷¹ He held many elective offices, including Assistant Secretary for the Indiana House of Representatives in 1835 and 1837, 6th Judicial Circuit Prosecuting Attorney from 1839 to 1844, and serving as the Henry County Treasurer from 1834 to 1839.¹⁷² In 1839, he was elected to a three-year term in the Indiana Senate.¹⁷³ The general assembly elected him to the position of circuit judge in 1844 at the age of thirty-one.¹⁷⁴ In 1851, he resigned to become the president of the Cincinnati, Logansport & Chicago Railroad, but within three years he returned to private law practice.¹⁷⁵ He quickly returned to public office. In 1855, he was elected to the position of circuit

161. *In Memoriam*, 270 INDIANA REPORTS xxxi, xxxi (1980) [hereinafter *Draper Memoriam*].

162. *Id.* at xxxii.

163. *Id.*

164. *Id.*

165. *Id.* at xxxi.

166. 55 INDIANA BIOGRAPHY SERIES, *supra* note 2, at 70.

167. *Draper Memoriam*, *supra* note 161, at xxxi.

168. 55 INDIANA BIOGRAPHY SERIES, *supra* note 2, at 70.

169. 1 MONKS, *supra* note 25, at 255.

170. 1 *id.*

171. 1 *id.*

172. 1 *id.*

173. 1 BIOGRAPHICAL DIRECTORY, *supra* note 55, at 116.

174. *Sketch of Judge and Mrs. Jehu T. Elliot Read to Historical Society*, NEW CASTLE COURIER, Nov. 3, 1919, reprinted in 2 INDIANA BIOGRAPHY SERIES, *supra* note 2, at 128.

175. *Id.*

judge.¹⁷⁶ He was elected to the Indiana Supreme Court in 1864.¹⁷⁷ After serving one term, he once again returned to private law practice in 1871.¹⁷⁸ In his thirty-seven-year career, he served twenty-four years on the bench, eighteen years on circuit courts, and six years on the Indiana Supreme Court.¹⁷⁹

ELLIOTT, BYRON KOSCIUSKO
(Thirtieth Justice)

Justice Elliott was born on September 4, 1835, in Butler County, Ohio, and died November 19, 1913, in Indianapolis.¹⁸⁰

He came to Indianapolis in 1850 with his father.¹⁸¹ He attended the Marion County Seminary and then studied law and was admitted to the bar in February 1858.¹⁸²

In May 1859, he was elected city attorney of Indianapolis.¹⁸³ The Civil War caused him to leave office and serve as a captain of the 132nd Indiana Volunteers, subsequently rising to the rank of an adjutant-general.¹⁸⁴ After the war he resumed serving as city attorney.¹⁸⁵ In 1870, Elliott was elected judge of the Marion County Criminal Court.¹⁸⁶ In 1872, he was re-elected to the city attorney post, and in 1876 he was elected to the superior court.¹⁸⁷ In 1880, he was elected to the supreme court and served from January 3, 1881 until January 2, 1893.¹⁸⁸

He was a lecturer in the Central Law School of Indianapolis and at the law schools of DePauw University and Northwestern Christian (now Butler) University.¹⁸⁹ He later became president of the Indiana Law School of Indianapolis.¹⁹⁰ Along with his son, he wrote *The Work of the Advocate, General Practice and Appellate Procedure*.¹⁹¹ He also practiced law with his son after his service on the bench.¹⁹²

176. *Id.*

177. 1 MONKS, *supra* note 25, at 255.

178. 1 *id.*

179. 3 DUNN, *supra* note 19, at 134.

180. 1 MONKS, *supra* note 25, at 268-69.

181. 1 *id.* at 268.

182. 1 *id.*

183. 1 *id.*

184. 1 *id.*

185. 1 *id.*

186. 1 *id.*

187. 1 *id.*

188. 1 *id.*

189. 1 *id.*

190. 1 *id.*

191. 1 *id.*

192. 1 *id.*

EMMERT, JAMES A.
(Seventy-ninth Justice)

Justice Emmert was born September 26, 1895, in Laurel, Indiana, and died April 14, 1974, in Shelbyville, Indiana.¹⁹³

He was a graduate of the Clarksburg (Indiana) High School and the Tennessee Military Institute.¹⁹⁴ He received an undergraduate degree from Northwestern University and a law degree from Harvard Law School.¹⁹⁵ “United States Supreme Court Justice Frankfurter [said] that Judge Emmert was the best research student he ever had at Harvard.”¹⁹⁶

He began his first law practice in Shelbyville, Indiana in 1923.¹⁹⁷ In 1925, he was elected mayor of Shelbyville.¹⁹⁸ Then, in 1928, while serving as mayor, he was elected judge of Shelby Circuit Court and was subsequently re-elected in 1934.¹⁹⁹ In 1940, he was a candidate for governor of Indiana, but he lost the nomination.²⁰⁰ He was elected Indiana Attorney General in 1942 and was re-elected in 1944.²⁰¹ In 1946, he was elected to the Indiana Supreme Court where he served until January 5, 1959.²⁰² Justice Emmert served as chief justice for several six month rotation periods, which was the practice of the time.²⁰³ Then, toward the end of his service on the bench, he was elected by the court to serve a one year term as chief justice.²⁰⁴

In addition to his legal accomplishments, he was a World War I Army veteran, having served twenty-two months at a British general hospital in France.²⁰⁵

Known for his eccentricity, he set up housekeeping in his Indiana State House chambers in order to avoid traveling to Shelbyville.²⁰⁶ He had a sofa-bed installed, and prepared his meals on a hot-plate.²⁰⁷

ERWIN, RICHARD KENNEY
(Fifty-sixth Justice)

Justice Erwin was born July 11, 1860, in Union Township, Adams County,

193. *Obituaries*, RES GESTAE, May 1974, at 32, 32-33.

194. *Id.*

195. *Id.*

196. *The Fun of Being a Lawyer and a Judge*, INDIANA LAWYER, Jan. 11, 1995, at 5, 5 (reflections on Justice Emmert in a speech given by Justice Givan) [hereinafter Givan Speech].

197. *Obituaries*, *supra* note 193, at 33.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. Givan Speech, *supra* note 196, at 5.

203. *Obituaries*, *supra* note 193, at 33.

204. *Id.*

205. Givan Speech, *supra* note 196, at 5.

206. *Obituaries*, *supra* note 193, at 33.

207. *Id.*

Indiana, and died on October 5, 1917, in Fort Wayne, Indiana.²⁰⁸

He was educated in the district school and attended one term at Methodist College, in Fort Wayne, Indiana.²⁰⁹ While studying law, he taught school in Allen and Adams counties.²¹⁰ He was admitted to the Indiana bar in 1886.²¹¹

In 1891, Justice Erwin was elected to the Indiana House of Representatives, and then re-elected in 1893.²¹² From 1889 to 1897, he was county attorney of Adams County, Indiana and then became judge of the 26th Indiana Judicial Circuit from 1901 to 1907.²¹³ He was elected to the Indiana Supreme Court in 1912 by a plurality of 120,330 votes, the largest ever given any Indiana Supreme Court Justice.²¹⁴ He served on the Indiana Supreme Court from January 6, 1913 until his death on October 5, 1917.²¹⁵

EWBANK, LOUIS B.
(Sixty-second Justice)

Justice Ewbank was born September 5, 1864, in Guilford, Indiana, and died March 6, 1953, in Guilford, Indiana.²¹⁶

He was educated in the Dearborn County Indiana schools and studied law in the offices of William Watson Woollen, beginning in 1891.²¹⁷

He practiced law in the firm of Hanan, Ewbank, & Hanan in Lagrange, Indiana from 1910 to 1912 and then moved to Indianapolis.²¹⁸ In 1914, he was elected Marion County Circuit Court Judge, a position he held until 1920 when Governor James P. Goodrich appointed him to the Indiana Supreme Court to fill the vacancy created by the death of Justice Harvey.²¹⁹ Justice Ewbank was subsequently elected for a six-year term, serving until January 1927.²²⁰ In 1927, he returned to private practice at Whitcomb, Ewbank, & Dowden.²²¹ In 1940, he entered a practice with his brother, Richard L. Ewbank.²²²

208. 1 MONKS, *supra* note 25, at 290; C.J. Spencer, *In Memoriam*, 186 INDIANA REPORTS xxxvi, xxxvi (1918) [hereinafter *Erwin Memoriam*].

209. 1 MONKS, *supra* note 25, at 290.

210. *Erwin Memoriam*, *supra* note 208, at xxxvi.

211. 1 MONKS, *supra* note 25, at 290.

212. 1 *id.*

213. 1 *id.*

214. 1 *id.*

215. *Erwin Memoriam*, *supra* note 208, at xxxvii.

216. Herman W. Kothe et al., *In Memoriam*, 231 INDIANA REPORTS xlv, xlv (1953) [hereinafter *Ewbank Memoriam*].

217. *Id.*

218. *Louis B. Ewbank Dies, Noted in Law Career*, INDIANAPOLIS STAR, Mar. 8, 1953, sec. 2, at 5, reprinted in 39 INDIANA BIOGRAPHY SERIES, *supra* note 2, at 111.

219. *Ewbank Memoriam*, *supra* note 216, at xlv.

220. *Id.*

221. *Id.* at xlvi.

222. *Id.*

He served on the faculty of the old Indiana Law School from 1897 to 1914, and also lectured at the Indiana University School of Law—Bloomington.²²³ He is noted for the following publications: *Manual of Indiana Appellate Practice*; *Indiana Trial Practice*; *Indiana Criminal Law* (which was known as “the prosecutor’s Bible”); *Modern Business Corporations* (co-author); and *Indiana Cumulative Digest* (editor from 1904-1914).²²⁴

FANSLER, MICHAEL LOUIS
(Sixty-ninth Justice)

Justice Fansler was born on July 4, 1883, in Logansport, Indiana, and died July 26, 1963, in Indianapolis.²²⁵

He attended the University of Notre Dame from 1901 to 1905 and was admitted to the bar in 1905.²²⁶

He held various positions, first, as an assistant prosecuting attorney and then as a Logan County Prosecutor, from 1906 to 1914.²²⁷ He entered private practice, until he was elected to the Indiana Supreme Court.²²⁸ He served two terms on the Indiana Supreme Court, from January 1933 to January 1945.²²⁹

He chaired the Indiana Judicial Council from 1951 to 1960.²³⁰

FLANAGAN, DAN COLLINS
(Eighty-third Justice)

Justice Flanagan was born April 23, 1899 in Lafayette, Indiana, and died February 28, 1960 in Fort Wayne, Indiana.²³¹

Upon graduation from high school in Frankfort, he enlisted in the armed services, and served as a sergeant in World War I.²³² In 1921, he received an LL.B. from Benjamin Harrison Law School (now Indiana University School of Law—Indianapolis) and passed the bar.²³³

He served as a deputy prosecutor in both Fort Wayne and Allen County, Indiana.²³⁴ He was also the county attorney for Allen County in 1940.²³⁵ He taught at Valparaiso University and at the University of Notre Dame.²³⁶ He

223. 39 INDIANA BIOGRAPHY SERIES, *supra* note 2, at 111.

224. *Id.*

225. *Deaths of Indiana Lawyers*, RES GESTAE, July 1963, at 29, 29.

226. *Id.*

227. 4 WHO WAS WHO 298 (Marquis 1968).

228. 4 *id.*

229. 4 *id.*

230. *Deaths*, *supra* note 226, at 29.

231. *In Memoriam*, 240 INDIANA REPORTS xli, xli (1960) [hereinafter *Flanagan Memoriam*].

232. *Id.*

233. 4 WHO WAS WHO, *supra* note 227, at 316.

234. *Flanagan Memoriam*, *supra* note 231, at xlii.

235. *Id.*

236. *Id.* at xliii.

was appointed to, and served on the Appellate Court of Indiana from 1941 to 1949, and on the Indiana Supreme Court from 1953 until January of 1955.²³⁷ He returned to private practice in Fort Wayne between his court terms and following his tenure on the supreme court, continuing to practice until his death in 1960.²³⁸

FRAZER, JAMES SOMERVILLE
(Eighteenth Justice)

Justice Frazer was born July 17, 1824, in Hollidaysburg, Pennsylvania, and died February 20, 1893, in Warsaw, Indiana.²³⁹

He moved to Wayne County, Indiana in 1837 and studied law there.²⁴⁰ In March 1845, he was admitted to the Indiana bar.²⁴¹

He served in the Indiana House of Representatives in 1847-48 and 1854.²⁴² From 1865 to 1871, he was an Indiana Supreme Court Justice.²⁴³

In 1871, President Ulysses S. Grant appointed him a commissioner to adjust the claims between Great Britain and the United States arising from the Civil War.²⁴⁴ He devoted himself to that task until 1875.²⁴⁵ In 1879, he was appointed to revise and codify the laws of Indiana, which resulted in the Revised Statutes of 1881.²⁴⁶ In 1889, he was appointed Kosciusko Circuit Court Judge.²⁴⁷

GAUSE, FRED C.
(Sixty-fourth Justice)

Justice Gause was born August 29, 1879, in Wayne County, Indiana, and died February 15, 1944, in Indianapolis.²⁴⁸

He studied at Indiana University from 1898 to 1900 and graduated from the Law Division.²⁴⁹ He was admitted to the Indiana bar in 1900 and began practice as a county attorney in New Castle.²⁵⁰ He served as the Henry County Attorney from 1902 to 1912, and as Henry Circuit Court Judge from 1914 to 1923.²⁵¹ When Indiana Supreme Court Justice Howard Townsend died in office, Justice

237. *Id.* at xlii.

238. *Id.* at xliii.

239. 1 MONKS, *supra* note 25, at 254-55.

240. 1 *id.* at 254.

241. 1 *id.*

242. 1 *id.*

243. 1 *id.*

244. 1 *id.*

245. 1 *id.*

246. 1 BIOGRAPHICAL DIRECTORY, *supra* note 55, at 134.

247. 1 MONKS, *supra* note 25, at 255.

248. 2 WHO WAS WHO 206 (Marquis 1950).

249. *F.C. Gause, Former Judge, Succumbs*, INDIANAPOLIS STAR, Feb. 16, 1944, at 1, reprinted in 27 INDIANA BIOGRAPHY SERIES, *supra* note 2, at 29.

250. 2 WHO WAS WHO, *supra* note 248, at 206.

251. 2 *id.*

Gause was appointed as his successor.²⁵² He completed Justice Townsend's term of office from November 21, 1923 to January 5, 1925, but failed to win a bid for re-election.²⁵³ He then returned to private law practice with the firm of Pickens, Gause & Pickens.²⁵⁴

GEMMILL, WILLARD BEHARRELL
(Sixty-fifth Justice)

Justice Gemmill was born on August 7, 1875 in Rigdon, Indiana, and died May 24, 1935 in Marion, Indiana.²⁵⁵

He received a Bachelor of Philosophy from DePauw University in 1897 and an LL.B. from the Indiana Law School in 1902.²⁵⁶ He was admitted to the Indiana bar in 1902 and practiced law in Marion, Indiana.²⁵⁷ He served in the Indiana House of Representatives from 1909 to 1911 and in the Indiana Senate from 1914 to 1918.²⁵⁸ He became Marion City Attorney in 1918, but resigned after only one month to take the position of Indiana Special Deputy Attorney General. After having served in that capacity from 1918 to 1920, he resigned to return to private law practice.²⁵⁹ He was an Indiana Supreme Court Justice from 1925 to 1931.²⁶⁰ After losing a re-election bid, he returned to Marion to practice with the law firm of Gemmill, Brown & Campbell.²⁶¹

GILKISON, FRANK EARL
(Seventy-eighth Justice)

Justice Gilkison was born November 3, 1877 in Martin County, Indiana, and died February 25, 1955 in Indianapolis.²⁶²

He received an LL.B from Indiana University in 1901.²⁶³ He practiced law in Shoals, Indiana from 1901 to 1935, where he served as deputy prosecuting attorney from 1907 to 1909.²⁶⁴ He served as a circuit court judge in the 49th Circuit from 1935 to 1945 and as an Indiana Supreme Court Justice from 1945

252. 27 INDIANA BIOGRAPHY SERIES, *supra* note 2, at 29.

253. *Id.*

254. *Id.*

255. 2 BIOGRAPHICAL DIRECTORY OF THE INDIANA GENERAL ASSEMBLY 151-152 (Justin Walsh et al. eds., 1984) [hereinafter BIOGRAPHICAL DIRECTORY]

256. 2 *id.* at 151.

257. 2 *id.*

258. 2 *id.*

259. *All Around the Town*, INDIANAPOLIS NEWS, June 5, 1930, at 3, *reprinted in* 4 INDIANA BIOGRAPHY SERIES, *supra* note 2, at 156.

260. 2 BIOGRAPHICAL DIRECTORY, *supra* note 255, at 152

261. *Former Judge of High Court Dead*, INDIANAPOLIS NEWS, May 25, 1935, at 3, *reprinted in* 4 INDIANA BIOGRAPHY SERIES, *supra* note 2, at 83.

262. 3 WHO WAS WHO 324 (Marquis 1960).

263. 3 *id.*

264. WHO'S WHO AND WHAT'S WHAT IN INDIANA POLITICS 809 (James E. Perry ed., 1944).

until his death during his term of office.²⁶⁵

GILLETT, JOHN HENRY
(Fiftieth Justice)

Justice Gillett was born September 18, 1860, in Medina, New York, and died March 16, 1920, in Hammond, Indiana.²⁶⁶

He was educated in the public schools of Valparaiso, Indiana.²⁶⁷ He studied law under the direction of his father, Judge Hiram A. Gillett and was admitted to the Indiana bar in 1881.²⁶⁸

He practiced law from 1881 to 1885, and he was also a law instructor at Northern Indiana Normal School.²⁶⁹ In 1885, he was appointed City Attorney of Valparaiso, Indiana.²⁷⁰ He served as Deputy Attorney General of Indiana from 1886 until 1890.²⁷¹ In 1890, he moved to Hammond, Indiana, and formed a law partnership with Peter Crumpacker which continued until June 1892.²⁷² He was appointed judge of the 31st Indiana Circuit Court, and was elected for a full term at the next election.²⁷³ He served on the circuit court from 1892 to 1902, when he was appointed to the Indiana Supreme Court to fill the vacancy created by the resignation of Justice Baker.²⁷⁴ In November 1902, he was elected for a full term and served until January 3, 1909.²⁷⁵

Among his other accomplishments, he authored two legal volumes: *Criminal Law and Indirect and Collateral Evidence*.²⁷⁶

GIVAN, RICHARD MARTIN
(Ninety-sixth Justice)

Justice Givan was born June 7, 1921, in Indianapolis.²⁷⁷

He graduated from Decatur Central High School in Indianapolis in 1939.²⁷⁸ He received an LL.B. from Indiana University in 1951, and was admitted to the Indiana bar in 1952.²⁷⁹

While he was a law school student, he was assistant librarian for the Indiana

265. *Id.*

266. 1 MONKS, *supra* note 25, at 284.

267. 1 *id.*

268. 1 *id.*

269. 1 *id.*

270. 1 *id.*

271. 1 *id.*

272. 1 *id.*

273. 1 *id.*

274. 1 *id.*

275. 1 *id.*

276. 1 *id.*

277. 2 BIOGRAPHICAL DIRECTORY, *supra* note 255, at 155.

278. Givan Speech, *supra* note 196, at 5.

279. 2 BIOGRAPHICAL DIRECTORY, *supra* note 255, at 155.

Supreme Court in 1949, and then became a research assistant for the Indiana Supreme Court.²⁸⁰ He was appointed deputy public defender of Indiana after graduation from law school and served in that post until 1954.²⁸¹ From 1954 to 1966, he was Assistant Attorney General of Indiana, pleading cases before both the Indiana and U.S. Supreme Courts.²⁸² In 1967, he was a representative and a ranking member of the Judiciary Committee in the Indiana Legislature.²⁸³ He was elected to the Indiana Supreme Court in 1968 and served continuously until his retirement in December 1994.²⁸⁴ He was also chairman of the board of directors of the Indiana Judicial Conference from 1974 to 1987, served on the board of managers of the Indiana Judges Association from 1975 to 1987, and became an Indiana Judicial College graduate in 1989.²⁸⁵

In addition to his legal career, Justice Givan served as a pilot in the U.S. Army Air Corps during World War II and was later a flight instructor with the Air Corps Reservists.²⁸⁶

A fourth generation lawyer, his great-grandfather, Noah S. Givan, was a circuit judge in Dearborn County, Indiana before 1900.²⁸⁷ His grandfather, Martin J. Givan, was a Dearborn County trial lawyer.²⁸⁸ His father, Clinton H. Givan, was a Marion County Superior Court Judge and practiced law in Indianapolis for forty years.²⁸⁹

GOOKINS, SAMUEL BARNES
(Fifteenth Justice)

Justice Gookins was born May 30, 1809, in Rupert, Vermont, and died June 14, 1880, in Terre Haute, Indiana.²⁹⁰

He moved to the Terre Haute area in 1823.²⁹¹ When his mother died, he went to live with another family.²⁹² He learned the newspaper business and from 1834

280. *Indiana Supreme Court is Reorganized*, RES GESTAE, Feb. 1969, at 24, 24.

281. Givan Speech, *supra* note 196, at 5.

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. *Indiana Supreme Court is Reorganized*, *supra* note 280, at 24; *Richard M. Givan New Chief Justice of Indiana*, RES GESTAE, Dec. 1974, at 1, 1 [hereinafter *Richard M. Givan*].

287. *Biographical Highlights of Seven Judicial Hopefuls*, RES GESTAE, Aug. 1974, at 12; *Richard M. Givan*, *supra* note 286, at 1; *Lawyers Polled on Judicial Retention*, 28 RES GESTAE 115 (1984).

288. *Biographical Highlights*, *supra* note 287, at 12; *Richard M. Givan*, *supra* note 286, at 1; *Lawyers Polled on Judicial Retention*, *supra* note 287, at 115.

289. *Biographical Highlights*, *supra* note 287, at 12; *Richard M. Givan*, *supra* note 286, at 1; *Lawyers Polled on Judicial Retention*, *supra* note 287, at 115.

290. TAYLOR, *supra* note 89, at 46.

291. *Id.*

292. *Id.*

to 1850 was widely known as a publisher.²⁹³

He was defeated in a race for the Indiana Supreme Court in 1852 while he was a member of the Indiana House of Representatives.²⁹⁴ In 1855, he ran again and won.²⁹⁵ He served on the Indiana Supreme Court from October 10, 1854 until December 1857, resigning for reasons of low pay and poor health.²⁹⁶ In 1857, a justice received only \$1200 per annum.²⁹⁷

He moved to Chicago, Illinois, and practiced law there until 1875, when he moved home to Terre Haute.²⁹⁸ He published a *History of Vigo County* in 1880.²⁹⁹

GREGORY, ROBERT CROCKETT
(Twenty-first Justice)

Justice Gregory was born February 15, 1811, in Kentucky and died January 25, 1885, in Lafayette, Indiana.³⁰⁰

At age two, his family moved to Indiana.³⁰¹ He lived in Crawfordsville, Indiana, from 1832 to 1843, and was admitted to practice there in 1838.³⁰²

He served in the Indiana Senate from 1841 to 1843.³⁰³ In 1843, he moved to Lafayette where he practiced law the rest of his life.³⁰⁴ He served on the Indiana Supreme Court from January 1865 to January 3, 1871.³⁰⁵

HACKNEY, LEONARD J.
(Forty-first Justice)

Justice Hackney was born March 29, 1855, in Edinburgh, Indiana, and died October 3, 1938, in Winter Park, Florida.³⁰⁶

He received very little public school education.³⁰⁷ In 1871, he was employed in the law office of Hord & Blair in Shelbyville, Indiana, where he later became an assistant.³⁰⁸ From 1873 to 1874, he was employed in the law office of John W. Kern in Kokomo, Indiana.³⁰⁹ He then became a clerk in the law firm of Baker,

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.*

298. 1 MONKS, *supra* note 25, at 251.

299. 1 BIOGRAPHICAL DIRECTORY, *supra* note 55, at 147.

300. *Id.* at 153.

301. 1 MONKS, *supra* note 25, at 255.

302. 1 *id.*

303. 1 *id.*

304. 1 *id.*

305. 1 BIOGRAPHICAL DIRECTORY, *supra* note 55, at 153.

306. 1 MONKS, *supra* note 25, at 278.

307. 1 *id.*

308. 1 *id.*

309. 1 *id.*

Hord, & Hendricks in Indianapolis and studied law there.³¹⁰

In 1876, he returned to Shelbyville, Indiana and opened a law office.³¹¹ He was elected prosecuting attorney of the 16th Indiana Judicial Circuit in 1878 and, after serving one term, resumed his private practice.³¹² On November 17, 1888, he took his seat on the bench of the 16th Indiana Circuit Court.³¹³ He was elected to the Indiana Supreme Court in 1892, assuming his official duties on January 2, 1893, and remained there until January 2, 1899.³¹⁴

In 1905, he became an attorney for the Cleveland, Cincinnati, Chicago, & St. Louis Railway Company.³¹⁵

HADLEY, JOHN VESTAL
(Forty-eighth Justice)

Justice Hadley was born in Hendricks County, Indiana, sometime between 1839 and 1842, and died November 17, 1915, in Danville, Indiana.³¹⁶

He attended Northwestern Christian (now Butler) University for one year before enlisting in the Union Army.³¹⁷

He served for three and one half years before the end of the Civil War.³¹⁸ He wrote a book regarding his experiences as a prisoner of war entitled, *Seven Months a Prisoner*.³¹⁹ He was wounded twice during the war and ultimately managed to escape from a POW camp in Columbia, South Carolina, and walk to Tennessee, where he found a camp of Union troops.³²⁰

After returning from the war, he studied at the Indianapolis Law School in 1866 and was admitted to the bar in the same year.³²¹ He was a circuit judge for eleven years and then served on the Indiana Supreme Court from January 1899 to January 1911.³²²

HAMMOND, EDWIN POLLOCK
(Thirty-fourth Justice)

Justice Hammond was born November 26, 1835, in Brookville, Indiana, and died January 27, 1920, in Lafayette, Indiana.³²³

310. 1 *id.*

311. 1 *id.*

312. 1 *id.*

313. 1 *id.*

314. 1 *id.*

315. 1 *id.*

316. 1 *id.* at 282; *In Memoriam*, 185 INDIANA REPORTS xxxi, xxxi-xxxii (1916).

317. 1 MONKS, *supra* note 25, at 282.

318. 1 *id.*

319. 1 *id.*

320. 1 *id.*

321. 1 *id.*

322. 1 WHO WAS WHO, *supra* note 145, at 499.

323. *In Memoriam*, 191 INDIANA REPORTS xxxvi, xxxvi-xxxvii (1923) [hereinafter *Hammond*

He moved to Columbus, Indiana, when he was fourteen, and later studied law in Indianapolis.³²⁴ In 1857, he was admitted to the senior law class at Asbury (now DePauw) University.³²⁵ Hammond was admitted to the Indiana bar in 1858.³²⁶

He practiced for two years prior to enlisting in the Union Army during the Civil War.³²⁷ After the war, he was appointed a circuit judge and he won election to a full term in 1878.³²⁸ He went from his circuit court seat to the Indiana Supreme Court in 1883.³²⁹ He sat on the high court from May 14, 1883, until January 6, 1885.³³⁰ He returned to private practice briefly, and then served two more years as a circuit judge.³³¹ He was also a trustee of Purdue University.³³²

HANNA, JAMES MCLEAN
(Sixteenth Justice)

Justice Hanna was born October 25, 1816 in Franklin County, Indiana and died January 15, 1872 in Curryville, Indiana.

He served as an Indiana State Senator from 1833 to 1835, as a 7th Circuit Prosecuting Attorney from 1844 to 1846 and as a Judge of the 6th Judicial Circuit from 1856 to 1857. He was appointed to the Indiana Supreme Court December 10, 1857, to fill the vacancy created by the resignation of Justice Gookins, and he was later elected to an additional term and remained on the bench until 1865. He then returned to his Sullivan County farm which supported the county's first underground coal mine.³³³

HARVEY, LAWSON MOREAU
(Fifty-ninth Justice)

Justice Harvey was born December 5, 1856, in Plainfield, Indiana, and died June 25, 1920, in Indianapolis.

He was educated in the public schools of Indianapolis and attended the Indianapolis Classical School. He also studied at Butler College in Indianapolis and at Haverford College in Pennsylvania. He graduated from the Central Law School in Indianapolis in 1882.

He entered the private practice of law, and, in 1894, he was elected to the Marion County Superior Court. After his term expired in 1898, he returned to private practice until 1907, when he returned to the bench in Marion County

Memoriam].

324. 1 MONKS, *supra* note 25, at 272.

325. 1 *id.*

326. 1 WHO WAS WHO, *supra* note 145, at 513.

327. *Hammond Memoriam*, *supra* note 323, at xxxvii.

328. 1 MONKS, *supra* note 25, at 272.

329. 1 *id.*

330. 1 *id.*

331. *Hammond Memoriam*, *supra* note 323, at xxxvii.

332. *Id.*

333. 1 BIOGRAPHICAL DIRECTORY, *supra* note 55, at 64; 1 MONKS, *supra* note 25, at 253.

Superior Court. He served in this position for one year, again returning to private practice afterward. He took his seat on the Indiana Supreme Court on January 1, 1917 and died in office in 1920.³³⁴

HENLEY, GEORGE WASHINGTON
(Eighty-sixth Justice)

Justice Henley was born May 13, 1890 in Washington, D.C., and died February 19, 1965 in Bloomington, Indiana.³³⁵

He attended Indiana University and received an A.B. in 1913 and an LL.B in 1914. He was admitted to the Indiana bar in 1914 and represented a variety of corporate clients in his private practice. He was an Indiana State Representative from 1937 to 1947.³³⁶ On March 15, 1955, this prominent Republican was appointed by Governor George S. Craig to the Indiana Supreme Court to fill the vacancy created by the death of Justice Gilkison.³³⁷ From the start, it was apparent that Justice Henley's appointment was designed to be temporary. Immediately after the announcement of his appointment, Henley told the press that he did not want the appointment, but he only wanted the prestige of having served.³³⁸ On April 14, 1955, Governor Craig announced the imminent resignation of Justices Henley and Levine (another 1955 appointee). Justice Henley was replaced by Justice Arterburn. Justice Arterburn was one of the candidates at the time of Justice Henley's appointment.³³⁹ The Governor defended this temporary appointment by pointing out that the \$13,000 salary level made it difficult to convince attorneys to give up private law practice.³⁴⁰ As it turned out, George Henley's moment of glory was fleeting. Newspaper reports covering the 1956 judicial elections indicated that Governor Craig appointed Justices Arterburn and Landis to replace Justices Gilkison and Draper, relegating Henley to immediate obscurity.³⁴¹

334. 3 *id.* at 1163; 1 WHO WAS WHO, *supra* note 145, at 531; *In Memoriam*, 191 INDIANA REPORTS xxxii, xxxii-xxxv (1923).

335. 2 BIOGRAPHICAL DIRECTORY, *supra* note 255, at 188-89.

336. 2 *id.*

337. *State High Court Vacancy Filled*, INDIANAPOLIS TIMES, Mar. 16, 1955, at 19, *reprinted in* 44 INDIANA BIOGRAPHY SERIES, *supra* note 2, at 36.

338. *Attorneys Vie for Brief Tenure on Bench of Supreme Court*, INDIANAPOLIS STAR, Mar. 17, 1955, at 1 (Henley appointed with the understanding that he would serve until May 21, 1955); *Craig Names Two State Supreme Court Judges*, INDIANAPOLIS STAR, Apr. 14, 1955, at 1 ("Levine and Henley were appointed with the understanding that they would enjoy the honor briefly and resign.").

339. *State High Court Vacancy Filled*, INDIANAPOLIS TIMES, Mar. 16, 1955, at 19, *reprinted in* 44 INDIANA BIOGRAPHY SERIES, *supra* note 2, at 36 (reporting that Norman Arterburn was among those mentioned to replace Justice Gilkison).

340. *Top Lawyers Shun High Court*, INDIANAPOLIS TIMES, May 20, 1955, at 1 (reporting the governor's defense of stop-gap appointments).

341. *Three Judges of the All Republican Supreme Court Announce Renomination Bids*,

HOLMAN, JESSE LYNCH
(Third Justice)

Justice Holman was born on October 24, 1784, in Danville, Kentucky, and died on March 28, 1842 in Aurora, Indiana.³⁴²

He attended a public school in Kentucky, and he read law in the Lexington office of Henry Clay.³⁴³ He moved to Indiana in 1810, and he was named the Prosecutor of Dearborn County, Indiana in 1811.³⁴⁴ He was elected to the Indiana Territorial Legislature in 1814, but resigned the same year to accept an appointment as a judge of the 2nd District of the Indiana Territory. He sat on the Indiana Supreme Court from December 1816 to December 1830.³⁴⁵ He was an unsuccessful candidate for the U.S. Senate, losing to John Tipton by only one vote.³⁴⁶ In 1835, he became a federal district court judge, a post he held until death.³⁴⁷

It appears he come into a considerable estate soon after he turned twenty-one. Five years later, he brought his slaves to Indiana for the sole purpose of liberating them. He was the preacher at the Aurora Baptist Church for most of his life. He was also on the Board of Visitors of Indiana University for twenty years. He is considered a founder of both Indiana University and Franklin College.³⁴⁸

HOVEY, ALVIN PETERSON
(Fourteenth Justice)

Justice Hovey was born September 6, 1821, in Mt. Vernon, Indiana, and died November 23, 1891, in Indianapolis.

He was virtually self-educated in the law, having received only a common school education before he began his legal studies. He was admitted to the Indiana bar in 1843 and began legal practice at Mount Vernon, Indiana. In 1850, he was elected a member of the Indiana Constitutional Convention and was later chosen judge of the Third Indiana Judicial Circuit, because of his exemplary service at the convention. He served as circuit judge for three years and was then appointed to be an Indiana Supreme Court Justice on May 8, 1854, to fill the vacancy caused by the resignation of Justice Roach. He held that position only a few months,

INDIANAPOLIS STAR, Jan. 27, 1956, at 19 (indicating that the re-election announcement states that Governor Craig appointed Arterburn and Landis to replace Gilkison and Draper).

342. TAYLOR, *supra* note 89, at 33; WHO WAS WHO, HISTORICAL VOLUME, 1607-1896, at 257 (Marquis 1963).

343. TAYLOR, *supra* note 89, at 33.

344. *Id.*

345. 1 MONKS, *supra* note 25, at 186-87.

346. TAYLOR, *supra* note 89, at 32. This may seem somewhat unusual, but it must be remembered that until 1913, U.S. Senators were chosen by the state legislatures. U.S. CONST. art. I, § 3, cl. 1 (amended 1913).

347. 1 MONKS, *supra* note 25, at 186; 2 *id.* at 411.

348. 1 *id.* at 186-87.

suffering defeat in his 1855 election bid. Justice Hovey was then appointed U.S. District Attorney for Indiana by President Franklin K. Pierce, and held that office until his removal by President James Buchanan.

When the Civil War began, Justice Hovey was appointed a colonel in the Union Army by Governor Morton and served throughout the war. When he left the military in October 1865, he held the rank of major general. In 1865, he was appointed U.S. Minister to Peru and held that position for five years. He resigned in 1870, and returned to Indiana to resume his law practice. In 1886, he was elected to the U.S. House of Representatives. Two years later, he made a successful bid for governor of Indiana on the Republican ticket. He died in office in 1891.³⁴⁹

HOWARD, TIMOTHY EDWARD
(Forty-third Justice)

Justice Howard was born on January 27, 1837 in Northfield, Michigan, and died July 9, 1916 in South Bend, Indiana.

He attended the University of Michigan from 1855 to 1857, but received his degrees, an A.B. in 1862, an A.M. in 1864, and an Honorary LL.D. in 1893, from the University of Notre Dame.³⁵⁰ He left school in 1862, shortly before graduation, to enlist in the 12th Michigan Infantry. During his Civil War service, he was wounded at Shiloh and was discharged because of a disability. Howard then returned to Notre Dame to continue his studies.³⁵¹ He was admitted to the Indiana bar in 1883. He held a variety of public offices, including Inspector of Schools in 1858, and served several terms between 1878 and 1913 as South Bend City Councilman. From 1879 to 1883, he was also the St. Joseph County Clerk. He was an Indiana State Senator from 1887 to 1891, and from 1888 to 1891, he was also the South Bend City Attorney. He served on the Indiana Supreme Court from 1893 to 1899. Later, he was the President of the Indiana Fee and Salary Commission and a member of the Commission for Revising and Codifying the Laws of Indiana.³⁵²

He began his professional career teaching in public school and was a professor of rhetoric and English at the University of Notre Dame, but he taught a variety of subjects including mathematics and astronomy.³⁵³ He apparently left the university for a short period, indicating to the Reverend Father Sorin, the Founder of the University, in a letter dated January 22, 1867 that “as a college, Notre Dame is not successful.” In his opinion, it was at best a prosperous high school because it required the instructors to teach too many disparate subjects. He later returned

349. 1 MONKS, *supra* note 25, at 250-51; 2 *id.* at 481-84.

350. 1 BIOGRAPHICAL DIRECTORY, *supra* note 55, at 192-193.

351. UNIVERSITY OF NOTRE DAME, SILVER JUBILEE JUNE 23, 1869, at 113-14 (Joseph A. Lyons ed., Chicago, E.B. Myers & Co. 1869).

352. 1 BIOGRAPHICAL DIRECTORY, *supra* note 55, at 193.

353. 1 ENCYCLOPEDIA OF BIOGRAPHY OF INDIANA 257-60 (George I. Reed ed., Chicago, Century Publ. & Engraving Co. 1895) [hereinafter ENCYCLOPEDIA].

to teaching at Notre Dame and must have had a lighter teaching assignment because he was able to find time to read and practice law. In later years, he was a law professor, and during his time on the Indiana Supreme Court, he was an adjunct professor for a course on the appellate jurisdiction of the Indiana Supreme Court.³⁵⁴ In 1898, he was awarded the Laetare Medal, a prestigious award for catholic laypersons given by the University of Notre Dame.³⁵⁵ The Laetare Medal goes to an American Catholic distinguished in literature, science or art.³⁵⁶ His publications include: *History of St. Joseph County, Indiana* (1907), *Excelsior* (1868), *History of Notre Dame, 1842-1891* (1895), *Laws of Indiana* (1900), *Indiana Supreme Court* (1900), *Musings and Memories* (1905).³⁵⁷

HOWK, GEORGE VAIL
(Twenty-eighth Justice)

Justice Howk was born September 21, 1824, in Charlestown, Indiana, and died January 13, 1892 in New Albany, Indiana.³⁵⁸

He studied law with Charles Dewey (the Seventh Justice) and later married Justice Dewey's daughter.³⁵⁹ He held a variety of public posts. He was a New Albany City Judge from 1852 to 1853 and served several terms as a New Albany City Councilman between 1850 and 1863. He was an Indiana State Representative in 1863 and an Indiana State Senator in 1867 and 1869. He was elected to the post of judge in the 6th Court of Common Pleas District in 1858. Howk was elected to the Indiana Supreme Court and served as justice from 1877 to 1889. He then returned to private law practice and later was appointed Floyd Circuit Court Judge.³⁶⁰

HUGHES, JAMES PETER
(Seventieth Justice)

Justice Hughes was born December 18, 1874, near Terre Haute, Indiana, and died August 30, 1961, in Greencastle, Indiana.

He received a Bachelor of Philosophy (Ph.B.) from DePauw University in 1898 and an LL.B. from Indiana University in 1900. He was admitted to the Indiana bar in 1900 and practiced law in Greencastle, where he was a prosecutor from 1902 to 1911, and a circuit judge from 1911 to 1933. He then served on the Indiana Supreme Court from 1933 to 1936. He practiced law until 1941 and

354. REV. PHILIP S. MOORE, A CENTURY OF LAW AT NOTRE DAME 8 n.18 (1969).

355. UNIVERSITY OF NOTRE DAME GOLDEN JUBILEE: 1842-1892, at 192-93 (Chicago, Werner Co. 1895).

356. ARTHUR J. HOPE, NOTRE DAME: ONE HUNDRED YEARS 233 (1943).

357. 1 BIOGRAPHICAL DIRECTORY, *supra* note 55, at 193.

358. 1 *id.*

359. TAYLOR, *supra* note 89, at 611.

360. *Id.* at 611-612; 1 BIOGRAPHICAL DIRECTORY, *supra* note 55, at 193; ALUMNAL RECORD DEPAUW UNIVERSITY 12 (Martha J. Ridpath ed., 1920).

retired to Greencastle.³⁶¹

HUNTER, DONALD HERBERT
(Ninety-fourth Justice)

Justice Hunter was born October 21, 1911, in Anderson, Indiana, and died October 27, 1991, in LaGrange, Indiana.

In 1937 he received an LL.B. from the Lincoln Law School and was admitted to the Indiana bar. He served in the Indiana House of Representatives, as a deputy attorney general of Indiana, as a hearing officer with the Public Service Commission, and then from 1948 to 1962 as a circuit judge. In 1963, he joined the Indiana Court of Appeals, and was chief judge in 1966. In 1967, he joined the Indiana Supreme Court. He served as a justice until 1985, when he reached the mandatory age of retirement.³⁶²

He was also a member of the Indiana Constitutional Revision Commission from 1967 to 1971.³⁶³

JACKSON, AMOS WADE
(Eighty-ninth Justice)

Justice Jackson was born June 25, 1904, in Versailles, Indiana, and died September 30, 1972, in Madison, Indiana.³⁶⁴

He received an A.B. from Hanover College in 1926. In 1925, while still a senior at Hanover, he was admitted to the Indiana bar.³⁶⁵ He served as Ripley County Prosecuting Attorney from 1937 to 1940.³⁶⁶ During World War II, he served as an associate attorney for the U.S. Army Corps of Engineers.³⁶⁷ He was appointed to the Indiana Supreme Court in 1959 and served on the court until he retired for health reasons in 1970.³⁶⁸

JASPER, PAUL GEORGE
(Eightieth Justice)

Justice Jasper was born December 15, 1908, in Fort Wayne, Indiana.

He received his LL.B. from Indiana University in 1932 and was licensed to

361. 4 WHO WAS WHO, *supra* note 227, at 472; *In Memoriam*, 241 INDIANA REPORTS xl-xlii (1962).

362. *Obituaries*, INDIANAPOLIS STAR, Oct. 29, 1991, at D9.

363. WHO'S WHO IN AMERICA 1592 (Marquis, 43rd ed. 1984); *Judicial Retention Subject of Bar Poll*, 26 RES GESTAE 108, 108 (1982).

364. *In Memoriam*, 246 INDIANA REPORTS xxxii, xxxii-xxxiv (1973) [hereinafter *Jackson Memoriam*]; *Obituaries*, RES GESTAE, Nov. 1972, at 23, 23.

365. *Alumni Portraits*, HANOVER COLLEGE ALUMNI NEWS, Spr. 1964, at 3.

366. *Jackson Memoriam*, *supra* note 364, at xxxii-xxxiv; *Obituaries*, RES GESTAE, Nov. 1972, at 23, 23.

367. *Id.*

368. *Id.*; HANOVER COLLEGE ALUMNI NEWS, Spr. 1964, at 3.

practice law in Indiana the same year.³⁶⁹

He practiced law in Fort Wayne until he joined the Indiana Supreme Court. He served on the high court from 1949 to 1953 and then served as general counsel to Public Service Indiana.³⁷⁰ He also served on the State Police Board for many years.³⁷¹

JOHNSON, JOHN
(First Justice)

Justice Johnson was born in Kentucky, date and place unknown, and died September 17, 1817, during the first recess of the Indiana Supreme Court and before any significant opinions were delivered.

He was an active early Indiana politician. He worked on the 1806 codification of Indiana law and was a Knox County delegate to the 1816 Indiana Constitutional Convention.³⁷²

JORDAN, JAMES HENRY
(Forty-fifth Justice)

Justice Jordan was born December 21, 1842, in Woodstock, Virginia, and died April 5, 1912, in Martinsville, Indiana.³⁷³

He attended Wabash College, but graduated in 1868 from Indiana University, where he received an LL.B. in 1871.³⁷⁴ During the Civil War, he served with the 45th Indiana Volunteers, 3d Indiana Cavalry and participated in all of the important battles of the Army of the Potomac.³⁷⁵ He fought in seventy-six engagements and was wounded twice.³⁷⁶ He read law with Judge William A. Porter and Thomas C. Slaughter, and was admitted to the Indiana bar in 1868.³⁷⁷ He was the prosecuting attorney of the Common Pleas District, which included Morgan, Johnson, Monroe, Brown, and Shelby counties, and served as the city attorney of Martinsville from 1873 to 1885.³⁷⁸ He was elected to the Indiana Supreme Court in 1894 and served three terms. Justice Jordan died in office.³⁷⁹

369. WHO'S WHO IN AMERICA 1577 (Marquis, 38th ed. 1974).

370. WORLD WHO'S WHO IN FINANCE AND INDUSTRY 377 (Marquis, 16th ed. 1971).

371. WHO'S WHO IN AMERICA, *supra* note 369, at 1577.

372. 1 MONKS, *supra* note 25, at 184-85.

373. *In Memoriam*, 177 INDIANA REPORTS xl, xl-xli (1913) [hereinafter *Jordan Memoriam*].

374. *Id.*; MYERS, *supra* note 60, at 405

375. *Jordan Memoriam*, *supra* note 373, at xl-xli.

376. *Id.*

377. MEN OF PROGRESS, INDIANA, *supra* note 20, at 281.

378. 2 ENCYCLOPEDIA, *supra* note 353, at 322-23.

379. MYERS, *supra* note 60, at 405; MEN OF PROGRESS, INDIANA, *supra* note 20, at 281; 2 ENCYCLOPEDIA, *supra* note 353, at 322-23; *Jordan Memoriam*, *supra* note 373, at xl-xli.

KRAHULIK, JON D.
(One hundred-first Justice)

Justice Krahulik was born December 31, 1944, in Indianapolis.

He received both an A.B. in 1965 and a J.D. *cum laude* in 1969 from Indiana University. He was admitted to the Indiana bar in 1969. He was also admitted to practice before the U.S. Court of Appeals, Seventh Circuit; the U.S. District Court, Southern District of Indiana, and the U.S. Tax Court.

He served from 1967 to 1969 on the *Indiana Legal Forum*, the predecessor to the *Indiana Law Review*, and was director of the Indiana Lawyers Commission in 1973. He was an adjunct professor of State Constitutional Law at Indiana University School of Law—Indianapolis in 1992.³⁸⁰

LAIRY, MOSES BARNETT
(Fifty-seventh Justice)

Justice Lairy was born August 13, 1859, in Cass County, Indiana, and died April 9, 1927, in Logansport, Indiana.³⁸¹

He went to the public schools and then taught there following graduation. He attended Valparaiso University, and then entered the law department at the University of Michigan, where he graduated in 1889. He was admitted to the Indiana bar the same year.³⁸²

He was appointed a circuit judge in 1895, and in 1910, he was elected to the Indiana Appellate Court. In 1914, he was elected to the Indiana Supreme Court and served from 1915 to 1921.³⁸³

LANDIS, FREDERICK, JR.
(Eighty-seventh Justice)

Justice Landis was born January 17, 1912, in Logansport, Indiana, and died March 1, 1990, in Logansport.

He received both his A.B. (1932) and his LL.B. (1934) from Indiana University. He was admitted to the Indiana bar in 1934. He was the prosecuting attorney for the 29th Circuit from 1938 to 1940. He served as an Indiana State Representative in 1951, and as an Indiana State Senator in 1953 and 1955.³⁸⁴ He resigned from the Senate on April 13, 1955 to accept an appointment to the Indiana Supreme Court. He replaced Justice Levine, who was appointed amid speculation that Levine would serve for a brief time before he was replaced by Landis.³⁸⁵ Justice Landis resigned from the Indiana Supreme Court on November

380. INDIANA LEGAL DIRECTORY (Biographical Section) 306 (1995 ed.).

381. *In Memoriam*, 198 INDIANA REPORTS xxviii, xxviii-xxx (1927).

382. *Id.*

383. *Id.* at xxix; 1 MONKS, *supra* note 25, at 290.

384. 2 BIOGRAPHICAL DIRECTORY, *supra* note 255, at 247.

385. Edward Ziegner, *Levine Hinted Giving Up New Judgeship Soon*, INDIANAPOLIS NEWS, Jan. 18, 1955, at 1; *Attorneys Vie for Brief Tenure on Bench of Supreme Court*, INDIANAPOLIS STAR,

8, 1965, and on the same day accepted an appointment as judge of the U.S. Court of International Trade.³⁸⁶ He held that position until 1983.³⁸⁷

LEVINE, ISADORE EDWARD
(Eighty-fifth Justice)

Justice Levine was born March 25, 1897, in Michigan City, Indiana, and died April 5, 1963, in LaPorte, Indiana.

He attended the University of Michigan and received an A.B. in 1920 and a J.D. in 1921. He was admitted to the Indiana bar in 1919 and opened a general law practice in LaPorte. In January 1955, he was appointed by Governor George S. Craig to the Indiana Supreme Court to fill the vacancy created by the resignation of Justice Floyd S. Draper.³⁸⁸ Justice Levine had never before held public office. He was appointed amid speculation that he would hold the office briefly and then resign with Senator Frederick Landis, Jr. as a possible replacement.³⁸⁹ In March 1955, newspaper reports continued the speculation that Levine would quit in favor of Landis.³⁹⁰ On April 14, 1955, Governor Craig announced the imminent resignation of Justices Levine and George Henley (another 1955 appointee).³⁹¹ Governor Craig defended the temporary appointment by pointing out that the \$13,000 salary level made it difficult to convince attorneys to give up private law practice.³⁹² As was the case with Justice Henley, Levine's brief "service" was quickly forgotten. In the next judicial elections, held in 1956, newspaper reports indicated that Governor Craig appointed Justices Arterburn and Landis to replace Justices Gilkison and Draper thus overlooking the abbreviated terms of Justices Henley and Levine.³⁹³

LEWIS, DAVID M.
(Ninety-third Justice)

Justice Lewis was born March 15, 1909, and died on September 24, 1985, in Indianapolis.

He graduated from DePauw University and the University of Chicago School of Law. He was admitted to the Indiana bar in 1932. He served as Marion

Mar. 17, 1955, at 1 (reporting speculation that Levine would quit for Landis to join the court).

386. *Judge Landis Takes Oath of Office*, RES GESTAE, Dec. 1965, at 18, 30.

387. *In Memoriam*, 33 RES GESTAE 488, 488 (1990).

388. WILLIAM M. HEPBURN, WHO'S WHO IN INDIANA 133 (1957).

389. Edward Ziegner, *Levine Hinted Giving Up New Judgeship Soon*, INDIANAPOLIS NEWS, Jan. 18, 1955, at 1.

390. *Attorneys View for Brief Tenure on Bench of Supreme Court*, INDIANAPOLIS STAR, Mar. 17, 1955, at 1.

391. *Craig Names Two State Supreme Court Judges*, INDIANAPOLIS STAR, Apr. 14, 1955, at 1.

392. *Top Lawyers Shun High Court*, INDIANAPOLIS TIMES, May 20, 1955, at 1.

393. *Three Indiana Supreme Court Judges Announce for Renomination*, INDIANAPOLIS STAR, Jan. 27, 1956, at 19.

County Prosecutor. He was appointed to the Indiana Supreme Court by Governor Branigan in 1967 to fill the vacancy created by the death of Justice Walter Myers. He served on the Indiana Supreme Court from June 21, 1967 to January 9, 1969.

His most notable Indiana Supreme Court opinion abolished the doctrine of charitable immunity, which had declared charitable institutions not responsible for their torts, thus preventing injured plaintiffs from recovering damages.³⁹⁴

MARTIN, CLARENCE R.
(Sixty-sixth Justice)

Justice Martin was born December 10, 1886, in Aberdeen, Ohio, and died May 2, 1972, in Indianapolis.

He graduated from the University of Michigan and its law school in the early 1900s. He was admitted to the Indiana bar in 1907. He began his legal practice in Indianapolis in 1907. In 1908, he became active in the Republican party, serving as chairman of the Speakers' Bureau in the early 1920s.³⁹⁵ In 1920, he was counsel to a U.S. Senate committee investigating radical activities. In 1922, he became campaign manager for U.S. Senator Albert J. Beveridge.³⁹⁶ He served on the Indiana Supreme Court from January 3, 1927, to January 3, 1933.³⁹⁷

He was also an army veteran of World War I, attaining the rank of major and commanding an infantry battalion at the front from 1917 to 1918.³⁹⁸

MCBRIDE, ROBERT WESLEY
(Thirty-ninth Justice)

Justice McBride was born January 25, 1842, in Richland County, Ohio, and he died May 15, 1926, in Indianapolis.

He attended school in Ohio and Iowa. He later taught school in Iowa, but in 1862 returned to Ohio and joined a cavalry company. He was a bodyguard to President Lincoln for about six months in 1863. In 1866, he moved to Waterloo, Indiana. In 1867, he was admitted to the Indiana bar after working as a clerk in the Indiana Senate.

In 1882, he was elected a circuit judge. In 1890, he was appointed to the Indiana Supreme Court to fill the vacancy caused by the death of Justice Joseph Mitchell. He served from December 17, 1890 until January 2, 1893. Coincidentally, he had been defeated by Mitchell in the November 1890 election for the same Indiana Supreme Court seat. He practiced law in Indianapolis until

394. *David Lewis Was State Chief Justice*, INDIANAPOLIS NEWS, Sept. 25, 1985, at 28, reprinted in 94 INDIANA BIOGRAPHY SERIES, *supra* note 2, at 121 (referring to *Harris v. YWCA of Terre Haute*, 237 N.E.2d 242 (Ind. 1968)).

395. *Ex-Chief Justice C. R. Martin Dies*, INDIANAPOLIS STAR, May 4, 1972, at 19, reprinted in 75 INDIANA BIOGRAPHY SERIES, *supra* note 2, at 36.

396. *Id.*; *Obituaries*, RES GESTAE, June 1972, at 32, 32.

397. *Ex-Chief Justice C. R. Martin Dies*, *supra* note 395, at 19.

398. *Obituaries*, *supra* note 396, at 32.

his death.³⁹⁹

MCCABE, JAMES
(Forty-second Justice)

Justice McCabe was born July 4, 1844, in Darke County, Ohio.⁴⁰⁰ He died in 1911, in Williamsport, Indiana.⁴⁰¹

His parents left Ohio and moved to Illinois during McCabe's childhood. He did not attend school until he was seventeen years old, while he was working as a section hand for the Monon Railroad in Crawfordsville, Indiana.⁴⁰² After attending a trial in Crawfordsville, he made up his mind to practice law. He taught school in the winter and began to study law in his spare time. He was admitted to the Indiana bar in 1871.⁴⁰³

He was an avid Democrat and twice ran unsuccessfully for the U.S. Congress. In 1892, he was elected to the Indiana Supreme Court, and served one six-year term, from January 2, 1893, until January 2, 1899. He was defeated in his bid for re-election, along with the rest of the Democratic slate. He returned to Williamsport, where he practiced law until his death.⁴⁰⁴ Former presidential candidate William Jennings Bryan journeyed from Nebraska to speak at Justice McCabe's memorial service.⁴⁰⁵

MCKINNEY, JOHN TALIAFERRO
(Sixth Justice)

Justice McKinney was born in 1796, in Caroline County, Virginia, and died March 4, 1837, at Brookville, Indiana.⁴⁰⁶

He was admitted to the Indiana bar on March 15, 1815. Two years later, he pleaded guilty to fistfighting in court and was fined five dollars. He practiced law in Brookville, Indiana. McKinney served two terms as an Indiana State Representative and three terms as an Indiana State Senator. He served in the senate until January 28, 1831, when he was appointed to the Indiana Supreme Court. He apparently saw military service during the War of 1812, but his biographical records are sketchy. Unfortunately, he contracted tuberculosis and died during his term of office.⁴⁰⁷

399. 1 MONKS, *supra* note 25, at 276.

400. 1 *id.* at 279.

401. TAYLOR, *supra* note 89, at 187; *In Memoriam*, 177 INDIANA REPORTS xxxix, xxxix-xl (1913) [hereinafter *McCabe Memoriam*].

402. 1 MONKS, *supra* note 25, at 279.

403. 1 *id.*

404. 1 *id.*

405. *McCabe Memoriam*, *supra* note 401, at xl.

406. 1 BIOGRAPHICAL DIRECTORY, *supra* note 55, at 254-55.

407. 1 MONKS, *supra* note 25, at 197-98; 1 BIOGRAPHICAL DIRECTORY, *supra* note 55, at 254-55.

MILLER, JOHN DONNELL
(Fortieth Justice)

Justice Miller was born December 2, 1840, in Clarksburg, Indiana, and died March 18, 1898, in Decatur County, Indiana.

He attended Hanover College from 1859 to 1861, where he studied law. Miller was admitted to the Indiana bar in 1866. He was the Greensburg City Clerk from 1866 to 1870 and the Greensburg City Attorney in 1871. He was appointed to the Indiana Supreme Court in February 1891 to fill the unexpired term of Justice Berkshire, who had died in office. In 1893, he lost his election bid for another term on the court. He served as a judge in the 8th Circuit from 1894 to 1898.⁴⁰⁸

MITCHELL, JOSEPH A. S.
(Thirty-fifth Justice)

Justice Mitchell was born December 21, 1837, near Mercersburg, Pennsylvania, and died December 12, 1890, in Goshen, Indiana.

He was educated in the Pennsylvania public schools. In 1854, he moved to Illinois and attended Blandisville Academy for two years. He returned to Pennsylvania in 1856 and studied law. He was admitted to the Indiana bar in 1859.

He opened a law office in Goshen in 1860. When the Civil War began, he enlisted in the Union Army, serving in the cavalry for two years. He re-entered legal practice at Goshen and formed a partnership with Judge John H. Baker. From 1872 to 1874, he served two terms as mayor of Goshen. He also served on the Board of Trustees of DePauw University.

He was elected to the Indiana Supreme Court in 1884 and re-elected for a second term, but died before his first term was completed. He served on the Indiana Supreme Court from January 6, 1885 to December 12, 1890.⁴⁰⁹

MONKS, LEANDER JOHN
(Forty-sixth Justice)

Justice Monks, in his autobiographical sketch, states that he was born July 10, 1843, in Winchester, Indiana.⁴¹⁰ He died April 19, 1919, in Indianapolis.⁴¹¹

He entered Indiana University in 1861 and stayed there until 1863. He was admitted to the Indiana bar in 1865. He practiced with various attorneys until 1878, when he was elected a circuit judge. He was twice re-elected and served until his election to the Indiana Supreme Court in 1894. He served eighteen years on the Indiana Supreme Court, from January 7, 1895 until January 7, 1913. He

408. 1 BIOGRAPHICAL DIRECTORY, *supra* note 55, at 273.

409. 1 MONKS, *supra* note 25, at 272, 273, 276.

410. 1 *id.* at 281.

411. 1 WHO WAS WHO, *supra* note 145, at 854.

was chief justice in 1904.⁴¹²

After leaving the bench he practiced law in Indianapolis. He is the author of the extremely valuable *Courts and Lawyers of Indiana*.⁴¹³

MONTGOMERY, OSCAR HILTON
(Fifty-first Justice)

Justice Montgomery was born April 27, 1859, near Seymour, Indiana, and died May 5, 1936, in Seymour.⁴¹⁴

He attended public schools until he was seventeen. He entered Hanover College and graduated from the classical department in 1881. He taught school for three years and studied law during vacations. He was admitted to the bar in 1884 and maintained a solo practice for over twenty years.

He was the city attorney of Seymour for ten years and held no other office until he was elected to the Indiana Supreme Court. He served from January 1905 until January 1911. He returned to Seymour to practice law and serve as a bank officer.⁴¹⁵

MORRIS, DOUGLAS J.
(Fifty-fourth Justice)

Justice Morris was born January 5, 1861, at Knightstown, Indiana, and died July 8, 1928, in Rushville, Indiana.

He graduated from DePauw University in 1882 and was admitted to the bar the following year in Rushville. He was elected a circuit judge in 1898. When his six-year term expired, he returned to private practice. In the fall of 1910, he was elected to the Indiana Supreme Court. He served as a justice from January 1911 to January 1917.⁴¹⁶

MOTE, DONALD ROOSEVELT
(Ninety-second Justice)

Justice Mote was born April 27, 1900, in Randolph County, Indiana, and died September 17, 1968, in Indianapolis.

He attended DePauw University, but graduated with an A.B. in 1923 from Wabash College, where he played tackle on the varsity football team. He received his LL.B from George Washington University Law School in 1927. During his time in Washington, D.C., he worked for Secretary of Commerce Herbert Hoover, and for the U.S. Department of Justice. He practiced law for thirty-five years in Indiana, first in Indianapolis and then in Wabash County.⁴¹⁷ He served as Indiana

412. *In Memoriam*, 188 INDIANA REPORTS xxvii, xxvii-xxxi (1920).

413. MONKS, *supra* note 25 (3 volumes).

414. 1 WHO WAS WHO, *supra* note 145, at 856.

415. 1 MONKS, *supra* note 25, at 285-86.

416. 1 *id.* at 288.

417. HUBERT H. HAWKINS & ROBERT M. MCCLARREN, INDIANA LIVES 554 (1967).

Deputy Attorney General in 1928 and as Wabash County Attorney from 1957 to 1962. He was a judge on the Indiana Appellate Court from 1962 to 1966. He was then elected to the Indiana Supreme Court in 1966, where he died in office two years later.⁴¹⁸

MYERS, DAVID ALBERT
(Fifty-eighth Justice)

Justice Myers was born August 5, 1859, in Cass County, Indiana, and died July 1, 1955, in Greensburg, Indiana.

He attended Smithson College, Danville Normal College, and Union University. He received a law degree from Union (now Albany) Law School at Albany, New York in 1882.⁴¹⁹

He began practicing law in 1883 at Greensburg, Indiana. In 1886, he was elected city attorney of Greensburg, Indiana. In 1899, he was appointed judge of the 8th Indiana Judicial District. In 1890 and 1892, he served as county prosecutor for the Decatur-Rush Judicial District.⁴²⁰ In 1904, he was appointed judge of the 1st District Indiana Appellate Court and was subsequently elected to the post, serving until 1913. He was elected to the Indiana Supreme Court in 1916, and re-elected in 1922 and 1928, serving altogether from January 1, 1917, to December 31, 1934. In thirty years as a member of Indiana's two highest courts, he served under eleven governors.⁴²¹

MYERS, QUINCY ALDEN
(Fifty-second Justice)

Justice Myers was born September 1, 1853, near Logansport, Indiana, and died December 27, 1921, in Indianapolis.⁴²²

In 1875, he received a B.A. from Dartmouth College, where he was editor of the student newspaper. In 1875, he studied law with the city attorney of Logansport for more than one year and then attended the Union (now Albany) Law School at Albany, New York, where he received a Bachelor of Laws in 1877. He was admitted to the Cass County bar in 1877 and worked in several law partnerships in Logansport.⁴²³ He was the Logansport City Attorney from 1885 to 1887 and twice was Cass County Attorney, from 1895 to 1897 and from 1903

418. *Id.*; *In Memoriam*, 248 INDIANA REPORTS xxxvii, xxxvii-xliii (1969); *State Supreme Justice Mote Dies*, INDIANAPOLIS STAR, Sept. 18, 1968, at 1, *reprinted in* 68 INDIANA BIOGRAPHY SERIES, *supra* note 2, at 107.

419. *In Memoriam*, 233 INDIANA REPORTS xlvii, xlvii-xlix (1955).

420. *Id.*

421. *Id.*; *David Myers, Ex-Judge, Dead*, INDIANAPOLIS NEWS, July 1, 1955, at 19, *reprinted in* 45 INDIANA BIOGRAPHY SERIES, *supra* note 2, at 24.

422. *In Memoriam*, 191 INDIANA REPORTS xlii, xlii-xlviii (1923) [hereinafter *Myers Memoriam*]; 1 WHO WAS WHO, *supra* note 145, at 886; *but see* 1 MONKS, *supra* note 25, at 287 (stating that Myers' date of death was December 21, 1921).

423. *Myers Memoriam*, *supra* note 422, at xlii.

to 1909. He was elected to the Indiana Supreme Court and served one term (1909 to 1915). He unsuccessfully sought the Republican nomination for governor in 1916.⁴²⁴ He then returned to private practice in Indianapolis.⁴²⁵

MYERS, WALTER, JR.
(Ninetieth Justice)

Justice Myers was born on June 9, 1914, in Indianapolis, and died June 2, 1967, in Indianapolis.

He attended Shortridge High School in Indianapolis. He graduated from Yale University in 1935, and received a law degree from Yale Law School in 1938.

He opened a legal practice in Indianapolis in 1939. Myers also lectured in business law at Butler University beginning in 1943. He was elected in 1958 to a four-year term on the Indiana Appellate Court where he served until 1962. He was then elected to the Indiana Supreme Court, where he served from January 7, 1963, until his death in 1967.⁴²⁶

NIBLACK, WILLIAM ELLIS
(Twenty-seventh Justice)

Justice Niblack was born May 19, 1822, in Dubois County, Indiana, and died May 4, 1893, in Indianapolis.

He attended a log school until age sixteen, when he entered Indiana University. The death of his father made it impossible for him to graduate. He took up surveying and then studied law, being admitted to the bar in 1854. He held various seats in the Indiana General Assembly and, in 1855, he was elected to the U.S. Congress. He served a total of fourteen years as a U.S. Representative and was very active in national Democratic politics. In January 1877, he joined the Indiana Supreme Court, and he remained on the bench until January 1889.⁴²⁷

He was elected in the "Upholstery War" of 1876, when Republican partisans began an uproar over the expenses of decorating the chambers of the Indiana Supreme Court. They claimed that lavish furnishings had been acquired, including upholstered chairs, carpets, lounge chairs, and other luxuries. Not to be outdone, many Democrats joined the fracas and denounced the waste of state funds. No corruption was found, but the members of the Indiana Supreme Court were affected by the taint of scandal.⁴²⁸

424. *Id.* at xliii.

425. 1 WHO WAS WHO, *supra* note 145, at 886.

426. *In Memoriam*, 246 INDIANA REPORTS lv, lv-lxiv (1968); *Walter Myers, Jr. Is Dead at 52*, INDIANAPOLIS NEWS, June 2, 1967, at 1, *reprinted in* 66 INDIANA BIOGRAPHY SERIES, *supra* note 2, at 75.

427. 1 BIOGRAPHICAL DIRECTORY, *supra* note 55, at 292.

428. 1 MONKS, *supra* note 25, at 264-65; 1 BIOGRAPHICAL DIRECTORY, *supra* note 55, at 292.

OLDS, WALTER
(Thirty-seventh Justice)

Justice Olds was born August 11, 1846, in Morrow County, Ohio, and died July 30, 1925, in Fort Wayne, Indiana.

He studied law at The Ohio State University. He was admitted to the Indiana bar in 1869. He served as an Indiana State Senator from 1877 to 1879 and was a judge in the 33rd Circuit from 1885 to 1888.⁴²⁹ He served on the Indiana Supreme Court from 1889 to June 15, 1893, when he resigned to practice law in Chicago. During the Civil War, he served as a private in the 174th Regiment, Ohio Volunteers.⁴³⁰

O'MALLEY, MARTIN JOSEPH "MART"
(Seventy-fifth Justice)

Justice O'Malley was born September 17, 1890, in Pittston, Pennsylvania, and died September 9, 1972, in Gainesville, Florida.⁴³¹

He attended St. Thomas College in Scranton, Pennsylvania, from 1910 to 1912, and received his LL.B. from Valparaiso University in 1915. He practiced law intermittently in Huntington, Indiana, from 1922 to 1965. He was Huntington County Attorney from 1930 to 1933, and twice Huntington City Attorney, from 1939 to 1943 and from 1955 to 1956. In 1942, he was elected to the Indiana Supreme Court, where he served until 1949.⁴³²

OSBORN, ANDREW LAWRENCE
(Twenty-fifth Justice)

Justice Osborn was born May 27, 1815, in Waterbury, Connecticut, and died April 13, 1891, in La Porte, Indiana.

He served as an Indiana State Representative from 1844 to 1846, and as an Indiana State Senator from 1846 to 1849. He was a judge in the 9th Circuit from 1857 to 1870. In December 1872, he was appointed to the Indiana Supreme Court, becoming the first to serve in the newly created Fifth Judicial District. He served until 1875, when he was defeated in his re-election bid. He then practiced law in Chicago.⁴³³

PERKINS, SAMUEL ELLIOTT
(Ninth Justice)

Justice Perkins was born on December 6, 1811, in Brattleboro, Vermont, and died December 17, 1879, in Indianapolis.

Left as an orphan at age five, he lived with friends in Massachusetts and then

429. 1 BIOGRAPHICAL DIRECTORY, *supra* note 55, at 298.

430. 1 *id.*; 1 MONKS, *supra* note 25, at 274.

431. *Obituaries*, RES GESTAE, Oct. 1972, at 22, 22.

432. *Id.*

433. 1 MONKS, *supra* note 25, at 259-60; 1 BIOGRAPHICAL DIRECTORY, *supra* note 55, at 300.

read law in New York.⁴³⁴ He arrived in Indiana in 1836 and opened a law office in Richmond, Indiana.⁴³⁵

He was very active in Democratic politics and edited a newspaper that recruited new party members from those displeased over the failure of the canals and other improvement projects.⁴³⁶ Governor Whitcomb nominated him to the Indiana Supreme Court, and his nomination was twice rejected by the Indiana Senate.⁴³⁷ He served on the supreme court created by Indiana's first constitution, until January 3, 1853 and then joined the supreme court, created by the second Indiana Constitution, on the same day. The only justice to serve on both supreme courts, he remained on the bench until January 3, 1865. He returned to the Indiana Supreme Court, serving from 1877 to 1879. He is remembered for his publication of an *Indiana Digest* of more than 800 pages and his *Indiana Practice*.⁴³⁸

PETTIT, JOHN
(Twenty-second Justice)

Justice Pettit was born June 24, 1807, in Sackets Harbor, New York, and died June 17, 1877, in Lafayette, Indiana.

He studied law with Judge Potter in Waterloo, New York, and then came to Indiana where he was admitted to the Indiana bar in 1833.⁴³⁹ He served as an Indiana State Representative from 1838 to 1839, as a U.S. District Attorney from 1839 to 1843, and as U.S. Representative from 1843 to 1849.⁴⁴⁰ In 1853, he was appointed a U.S. Senator to fill the unexpired term of James Whitcomb. He served in that capacity until 1855. He was a member of the 1850-1851 Indiana Constitutional Convention. He served as a judge in Indiana's 12th Circuit in 1855 and 1857. He traveled west to Kansas Territory and served as Chief Justice of the U.S. Courts there from 1859 to 1861.⁴⁴¹ Returning to Indiana, he served as Lafayette City Attorney from 1861 to 1865, and as mayor of Lafayette from 1867 to 1870.⁴⁴² He was elected to the Indiana Supreme Court in 1870. He completed just one term, leaving office in 1877.⁴⁴³

PIVARNIK, ALFRED J.
(Ninety-eighth Justice)

Justice Pivarnik was born in 1925 in Valparaiso, Indiana, and died June 3,

434. 1 MONKS, *supra* note 25, at 207.

435. WHO WAS WHO, *supra* note 342, at 406.

436. 1 MONKS, *supra* note 25, at 207.

437. 1 *id.*

438. 1 *id.* at 206-07.

439. 1 BIOGRAPHICAL DIRECTORY, *supra* note 55, at 313.

440. 1 *id.*

441. 1 MONKS, *supra* note 25, at 257.

442. 1 *id.* at 257-58.

443. 1 *id.*; 1 BIOGRAPHICAL DIRECTORY, *supra* note 55, at 313.

1995.

He received his law degree from Valparaiso University in 1951. During World War II, he served in the U.S. Army Air Force.⁴⁴⁴ He served as deputy prosecutor of Porter County from 1952 to 1958 and as prosecuting attorney from 1958 to 1962.⁴⁴⁵ He served as Porter Circuit Court Judge from 1962 to 1977, when he was appointed to the Indiana Supreme Court to fill the vacancy created by the retirement of Justice Arterburn.⁴⁴⁶ Justice Pivarnik was the first justice to join the Indiana Supreme Court through a nonpolitical merit system.⁴⁴⁷ He retired in 1990 due to poor health.⁴⁴⁸

PRENTICE, DIXON WRIGHT
(Ninety-seventh Justice)

Justice Prentice was born June 3, 1919, in Sellersburg, Indiana.

He received an LL.B. from Indiana University in 1942 and was subsequently admitted to the bar. From 1942 to 1946, he served in the Navy.⁴⁴⁹ He practiced law in Sellersburg from 1946 until 1970. He served on the Indiana Supreme Court from 1971 to 1985. He also served as a commissioner of the National Conference on Uniform State Laws.⁴⁵⁰

RAKESTRAW, FREDERICK EUGENE
(Ninety-first Justice)

Justice Rakestraw was born August 29, 1923 in Lima, Ohio.

He received an LL.B. from Indiana University in 1947 and was admitted to the Indiana bar in 1949. He served as a circuit judge from 1955 to 1965. He served on the Indiana Supreme Court briefly in 1966. He practices law in Rochester, Indiana.⁴⁵¹

RAY, CHARLES A.
(Twentieth Justice)

There is very little information on his early life and background. The only record that exists states that he was appointed judge of Indiana's 12th Common Pleas District on September 30, 1861. He was elected judge of the same district

444. *Biographies Trace Legal Careers Of Judges*, 24 RES GESTAE 415, 415 (1980).

445. *Ex-state Supreme Court Justice Alfred Pivarnik Dies*, INDIANAPOLIS STAR, June 5, 1995, at B1.

446. *Id.*

447. *Ceremonies Induct New Supreme Court Associate Justice—and Pay Tribute to Retiring Justice Arterburn*, 21 RES GESTAE 239, 239 (1977).

448. *Ex-state Supreme Court Justice Alfred Pivarnik Dies*, *supra* note 445, at B1.

449. WHO'S WHO 2253-54 (Marquis, 44th ed. 1986).

450. *Three Judges Subject to Bar Poll*, 20 RES GESTAE 344, 344-45 (1976).

451. INDIANA LEGAL DIRECTORY 429 (1990 ed.); Frederick E. Rakestraw, *Proposed Model Rules of Professional Conduct*, 28 RES GESTAE 475, 475 (1985).

in October 1862, and served on the bench until December 7, 1864, when he resigned to assume his newly-elected position on the Indiana Supreme Court. He served on the Indiana Supreme Court from January 3, 1865 to January 3, 1871. Justice Ray moved to California during the 1870s and became a judge there.⁴⁵²

RICHMAN, FRANK NELSON
(Seventy-fourth Justice)

Justice Richman was born July 1, 1881, in Columbus, Indiana, and died April 29, 1956, in Indianapolis.

He received an A.B. from Lake Forest (Illinois) College in 1904, and a J.D. in 1909 from the University of Chicago.⁴⁵³ He was admitted to the Indiana bar in 1908. He served on the Indiana Supreme Court from 1941 to 1947.⁴⁵⁴

He taught part-time at Indiana University School of Law—Indianapolis from 1944 to 1946, then became a professor there in 1947.⁴⁵⁵ He served as a judge of the American Military Tribunal, Division IV, Nuremberg Group in 1947.⁴⁵⁶ Later, he was the chair of the Indiana Judicial Council.⁴⁵⁷

ROACHE, ADDISON LOCKE
(Twelfth Justice)

Justice Roache was born November 3, 1817, in Rutherford County, Tennessee, and died April 24, 1906, in Indianapolis.

He moved to Bloomington, Indiana, in 1828. He graduated from Indiana University in 1836 and was admitted to the bar in 1839.⁴⁵⁸ In 1847, he was elected to the Indiana House of Representatives. On January 3, 1853, he took his seat on the supreme court. He resigned in May 1854 to become president of the Indiana & Illinois Central Railroad.⁴⁵⁹

ROLL, CURTIS WILLIAM
(Sixty-seventh Justice)

Justice Roll was born August 29, 1884, in Fredericksburg, Indiana, and died November 8, 1970, in Kokomo, Indiana.

He received both an A.B. (1909) and an LL.B. (1912) from Indiana University. He was admitted to the Indiana bar in 1912.⁴⁶⁰ He was the county

452. 1 MONKS, *supra* note 25, at 256.

453. 4 WHO WAS WHO, *supra* note 227, at 791.

454. *In Memoriam*, 234 INDIANA REPORTS xliv, xlv (1956) [hereinafter *Richman Memoriam*].

455. 4 WHO WAS WHO, *supra* note 227, at 791.

456. 4 *id.*

457. 4 *id.*; *Richman Memoriam*, *supra* note 454, at xlv-xlvi.

458. 1 BIOGRAPHICAL DIRECTORY, *supra* note 55, at 332-33.

459. 1 *id.*; 1 MONKS, *supra* note 25, at 249-50.

460. 7 WHO WAS WHO, *supra* note 11, at 490

attorney in Howard County from 1913 to 1914, and a prosecutor in Kokomo from 1912 to 1931. He served two terms on the Indiana Supreme Court, from 1931 to 1943.⁴⁶¹

SCOTT, JAMES
(Second Justice)

Justice Scott was born May 28, 1767, in Pennsylvania, and died on March 2, 1855, in Carlisle, Indiana.⁴⁶²

Records of his early education are sketchy, but the State University of Indiana granted him an honorary LL.D. in 1844 in recognition of his contributions to education in the state. In 1810, he was appointed Clark County Prosecutor by Governor William H. Harrison. He served as an Indiana State Representative in 1813. Scott resigned that position to become a chancery judge. In 1816, he attended the Indiana Constitutional Convention. He served on the Indiana Supreme Court from December 28, 1816, to December 28, 1830.⁴⁶³

He was a member of the judiciary committee that helped write the Indiana State Constitution. He is credited with authoring those sections that related to education.⁴⁶⁴

SCOTT, JOHN T.
(Twenty-ninth Justice)

Justice Scott was born May 6, 1831, in Glasgow, Kentucky, and died December 29, 1891.⁴⁶⁵

He attended public school in Glasgow until he was fourteen years old and then became an apprentice harnessmaker. He entered Franklin College in Tennessee at age nineteen. He attended Franklin College for two years, coming to Indiana in 1853, where he was employed as a surveyor on the railroad between Indianapolis and Decatur, Illinois.⁴⁶⁶

He began practicing law in 1856 in Montezuma, Indiana, and in 1860, he was elected district attorney for the 10th Indiana Common Pleas District.⁴⁶⁷ He was re-elected in 1862, and moved to Terre Haute where he finished his term. He re-entered private law practice until he was elected judge of the Common Pleas Court of Vigo County in 1868.⁴⁶⁸ He was re-elected to this office in 1872, but only held the position until the court was abolished by the legislature in 1873.⁴⁶⁹ In 1875, he was appointed to the Board of Trustees of the Indiana State Normal School and

461. 7 *id.*

462. 1 MONKS, *supra* note 25, at 186.

463. 1 *id.*

464. 1 *id.* at 185-86.

465. 1 *id.* at 266.

466. 1 *id.*

467. 1 *id.*

468. 1 *id.* at 267.

469. 1 *id.*

served in this capacity until December 29, 1879.⁴⁷⁰ At that time, he was appointed to the Indiana Supreme Court by Governor Williams, to fill a vacancy created by the death of Justice Samuel Perkins.⁴⁷¹ He served on the Indiana Supreme Court until January 5, 1881, when he was defeated in his re-election bid.⁴⁷² He then returned to private practice until his death.⁴⁷³

SELBY, MYRA CONSETTA
(One hundred-third Justice)

Justice Selby was born July 1, 1955, in Bay City, Michigan.

She received a B.A. from Kalamazoo College, with honors, in 1977, and a J.D. from the University of Michigan in 1980. She practiced law in Washington, D.C. from 1980 to 1983.⁴⁷⁴ She specialized in health law in her practice at the Indianapolis law firm of Ice Miller Donadio & Ryan, and was Health Policy Director under Governor Evan Bayh.⁴⁷⁵ In 1995, she was appointed as a Justice of the Indiana Supreme Court to replace retiring Justice Givan. She represents several firsts for the Indiana Supreme Court. She is the first woman and the first African-American to serve on this court. The former quality required construction of a women's restroom for the Indiana Supreme Court.⁴⁷⁶ She was also the first African-American partner in a major Indianapolis law firm, Ice Miller Donadio & Ryan.⁴⁷⁷ In her words, "It is always an achievement for there to be a first . . . the barriers can be broken down only when people feel comfortable with things they are unaccustomed to. The first is probably the least enviable position, but it is very important."⁴⁷⁸ She hopes that "there will one day be no such thing as a first."⁴⁷⁹

SHAKE, CURTIS GROVER
(Seventy-second Justice)

Justice Shake was born July 14, 1887, in Harrison Township, Knox County, Indiana, and died September 11, 1978.

He graduated from Vincennes University in 1906, and received an LL.B. from Indiana University in 1910.⁴⁸⁰ He was admitted to the Indiana bar in 1909 and

470. 1 *id.*

471. 1 *id.*

472. 1 *id.*

473. 1 *id.*

474. WHO'S WHO OF AMERICAN WOMEN 971 (Marquis 20th ed., 1997).

475. *Id.*

476. *Justice Myra Selby Takes Low-key Approach to High-profile Position*, RES GESTAE, Feb. 1995, at 13, 13.

477. *Id.*

478. Suzanne McBride, *Female Justice Marks Another First*, INDIANAPOLIS NEWS, Feb. 3, 1995, at A2.

479. *Id.*

480. *Shake Named to Serve on Indiana Court*, INDIANAPOLIS TIMES, Dec. 23, 1937, at 1,

practiced law primarily in Vincennes. He served in a variety of public positions, including terms as Knox County Deputy Prosecuting Attorney, Bicknell City Attorney, U.S. Commissioner, Knox County Attorney,⁴⁸¹ National Railroad Adjustment Board Referee, a member of a Presidential Emergency Board for Settlement of Railroad Strikes,⁴⁸² and, most prominently, as presiding judge for the U.S. Military Tribunal to try I.G. Farben Industries officials in Nuremberg, Germany.⁴⁸³ For this national recognition, he was elected to the Indiana Academy, an organization honoring people with a Hoosier background who have won national recognition for themselves or the state.⁴⁸⁴ He was an Indiana State Senator from 1928 to 1946. He was appointed to the Indiana Supreme Court in December 1938 to fill the vacancy created by the resignation of Justice Treanor.⁴⁸⁵ He was chief justice three times (1937, 1941 and 1946) and sat on the court until 1946.⁴⁸⁶ His publications include: *A History of Vincennes University* (1928), *The Old Cathedral and Its Environs* (1934) and *A Naval History of Vincennes* (1936).⁴⁸⁷

SHEPARD, RANDALL TERRY
(Ninety-ninth Justice)

Chief Justice Shepard was born December 24, 1946, in Lafayette, Indiana.

He received a A.B. *cum laude* from Princeton University in 1969. He studied law at Yale University and received a J.D. in 1972. He was admitted to the Indiana bar in the same year.⁴⁸⁸

He worked as the special assistant to the Undersecretary of the U.S. Department of Transportation from 1972 to 1974.⁴⁸⁹ From 1974 to 1979, he was the executive assistant to the mayor of Evansville, Indiana.⁴⁹⁰ Shepard served as

reprinted in 18 INDIANA BIOGRAPHY SERIES, *supra* note 2, at 53-54; *Curtis G. Shake was Judge at Nuremberg*, INDIANAPOLIS NEWS, Sept. 12, 1978, at 29, reprinted in 88 INDIANA BIOGRAPHY SERIES, *supra* note 2, at 13.

481. *Shake Named to Serve on Indiana Court*, INDIANAPOLIS TIMES, Dec. 23, 1937, at 1, reprinted in 18 INDIANA BIOGRAPHY SERIES, *supra* note 2, at 53-54; *Curtis G. Shake was Judge at Nuremberg*, INDIANAPOLIS NEWS, Sept. 12, 1978, at 29, reprinted in 88 INDIANA BIOGRAPHY SERIES, *supra* note 2, at 13.

482. *See Curtis G. Shake was Judge at Nuremberg*, INDIANAPOLIS NEWS, Sept. 12, 1978, at 29, reprinted in 88 INDIANA BIOGRAPHY SERIES, *supra* note 2, at 13.

483. *Id.*

484. *Id.*

485. *Shake Named to Serve on Indiana Court*, INDIANAPOLIS TIMES, Dec. 23, 1937, at 1, reprinted in 18 INDIANA BIOGRAPHY SERIES, *supra* note 2, at 53-54.

486. 2 BIOGRAPHICAL DIRECTORY, *supra* note 255, at 377.

487. *Id.*

488. WHO'S WHO IN AMERICAN LAW 710 (Marquis, 9th ed. 1996); WHO'S WHO IN THE MIDWEST 586 (Marquis 25th ed., 1996).

489. WHO'S WHO IN THE MIDWEST, *supra* note 488, at 586.

490. *Id.*

a superior court judge in Evansville from 1980 to 1985. In 1985, he was elevated to the Indiana Supreme Court. In 1987, he was named Chief Justice of Indiana, a position which he still holds.⁴⁹¹

Shepard has authored a book on historic preservation, as well as many professional articles on other legal topics.⁴⁹² His activities with the National Trust for Historic Preservation include: member of its Board of Advisors, chair of its Board of Advisors, and trustee.⁴⁹³ He also served as chair of the Historic Landmarks Foundation of Indianapolis.⁴⁹⁴ He is a member of numerous boards, advisory bodies and other commissions.

Chief Justice Shepard has received numerous awards and much recognition for his civic interests.⁴⁹⁵

SMITH, THOMAS L.
(Tenth Justice)

His dates of birth and death are unknown.

There is no available history of his early life prior to coming to Indiana. He practiced law in New Albany, Indiana, beginning about 1839. He served on the Indiana Supreme Court from January 29, 1847 to January 3, 1853, after which he returned to life in New Albany.⁴⁹⁶

SPENCER, JOHN WESLEY
(Fifty-third Justice)

Justice Spencer was born March 7, 1864, at Mount Vernon, Indiana, and died June 28, 1939, in Madison, Wisconsin.

He graduated from Mount Vernon High School in 1880, and afterwards was a student at the Central Indiana Normal College at Danville for one year. He studied law in his father's law office in Mount Vernon, and was admitted to the Indiana bar on his twenty-first birthday.⁴⁹⁷

He practiced law in Mount Vernon until 1890, when he was elected prosecuting attorney of the 1st Indiana Judicial Circuit.⁴⁹⁸ He moved to Evansville, Indiana, in 1891. He was re-elected prosecuting attorney in 1892 and remained in this post until 1895.⁴⁹⁹ Judge Spencer was then affiliated with the firm of Spencer & Brill until he was appointed to the Vanderburgh Circuit Court

491. *Shepard Installed as State Chief Justice*, 30 RES GESTAE 445, 445-46 (1987).

492. WHO'S WHO IN THE MIDWEST, *supra* note 488, at 586.

493. *Id.*

494. *Id.*

495. WHO'S WHO IN AMERICAN LAW, *supra* note 488, at 710; WHO'S WHO IN THE MIDWEST, *supra* note 488, at 586.

496. 1 MONKS, *supra* note 25, at 206.

497. *J.W. Spencer Sr. Dies in Wisconsin*, INDIANAPOLIS STAR, June 29, 1939, at 11, reprinted in 19 INDIANA BIOGRAPHY SERIES, *supra* note 2, at 39.

498. 3 MONKS, *supra* note 25, at 1365.

499. 3 *id.*

in 1911.⁵⁰⁰ He was then elected to the Indiana Supreme Court, where he served from April 15, 1912 to January 17, 1919.⁵⁰¹

STARR, OLIVER
(Seventy-seventh Justice)

Justice Starr was born December 10, 1883, in Wells County, Indiana, and died March 1961 in Chesterton, Indiana.

He obtained his A.B. from Indiana University in 1905, his LL.B. from the University of Michigan in 1908 and was admitted to practice in Indiana the same year.⁵⁰² He held the posts of city attorney in Gary, and prosecuting attorney for Lake County.⁵⁰³ He practiced law in Gary for many years. He served on the Indiana Supreme Court from 1945 to 1951.⁵⁰⁴

STEVENS, STEPHEN C.
(Fifth Justice)

Justice Stevens was born in Kentucky in 1793, and died November 7, 1870, in Indianapolis.⁵⁰⁵

He came to Brookville, Indiana, sometime before 1812. During the War of 1812 at the Battle of New Orleans, he received a musket ball wound to the head which troubled him the rest of his life, and probably caused his insanity in old age.⁵⁰⁶ After the war, he returned to Brookville, studied law, and was admitted to the Indiana bar in 1817.⁵⁰⁷ He represented Franklin County in the Indiana General Assembly in 1817. Renowned for his quick temper, he fought with Senator Noble in the Franklin Circuit Court in 1817, and both were fined five dollars.⁵⁰⁸

Justice Stevens moved to Vevay, Indiana in 1817 and helped organize a local branch of the state bank, serving as its president.⁵⁰⁹ When the bank failed, Justice Stevens returned to the practice of law. From 1823 to 1824, and again from 1826 to 1827, he represented Switzerland County in the Indiana House of Representatives. He held the position of speaker during 1824. In 1828, he was elected to the Indiana Senate, where he served until his appointment to the Indiana Supreme Court in 1830. He served on the Indiana Supreme Court from January 28, 1831 to May 30, 1836, when he resigned to open a law office in Madison,

500. 1 WHO WAS WHO, *supra* note 145, at 1162.

501. J.W. Spencer Sr. Dies in Wisconsin, INDIANAPOLIS STAR, June 29, 1939, at 11, reprinted in 19 INDIANA BIOGRAPHY SERIES, *supra* note 2, at 39.

502. 4 WHO WAS WHO, *supra* note 227, at 898.

503. Floyd S. Draper et al., *In Memoriam*, 240 INDIANA REPORTS xlvi, xlvi-xlvii (1961).

504. *Id.*

505. 1 MONKS, *supra* note 25, at 84; WOOLEN, *supra* note 129, at 357; but see 1 BIOGRAPHICAL DIRECTORY, *supra* note 55, at 371-72 (stating that Stevens died in 1869).

506. 1 MONKS, *supra* note 25, at 195.

507. 1 *id.* at 196.

508. 1 *id.*

509. 1 *id.*

Indiana. He amassed quite a fortune but lost it in a failed railroad investment.⁵¹⁰ As a result, he was placed in the state mental hospital where he died penniless.⁵¹¹ It was said that the Indianapolis bar paid for his burial.⁵¹²

STUART, WILLIAM Z.
(Thirteenth Justice)

Justice Stuart was born December 25, 1811, in Dedham, Massachusetts, and died May 6, 1876, at Clifton Springs, New York.⁵¹³

He lived in Massachusetts with his parents until age nine when the family returned to Scotland.⁵¹⁴ He studied under his mother, who was a well-educated teacher. At the age of fourteen, he ran away from home and returned to the United States, arriving without money or other assistance.⁵¹⁵ He worked as a drug store clerk while he studied medicine at Amherst College, where he graduated in 1833.⁵¹⁶ He studied law, moved to Indiana, and was admitted to the Indiana bar in 1837.⁵¹⁷ He was prosecuting attorney in the 8th Circuit from 1843 to 1845, and served as an Indiana State Representative from 1851 to 1852. He was elected to the Indiana Supreme Court in 1852, but resigned in 1858 to become an attorney for a railroad company.⁵¹⁸

SULLIVAN, FRANK L., JR.
(One hundred-second Justice)

Justice Sullivan was born March 21, 1950, in South Bend, Indiana.

He received a B.A. *cum laude* from Dartmouth College in 1972, and a J.D. from Indiana University *magna cum laude* in 1982. He was admitted to the Indiana bar in 1982.⁵¹⁹

He served on the staff of U.S. Congressman John Brademas from 1974 to 1979, including three years as staff director. He practiced law with an Indianapolis firm, Barnes & Thornburg, from 1982 to 1989.⁵²⁰ From 1989 to 1992, he was the budget director of the State of Indiana.⁵²¹ In 1993, he assumed the position of executive assistant to Governor Evan Bayh. Later in 1993, he received his appointment to the Indiana Supreme Court.⁵²²

510. 1 *id.* at 84, 195-97.

511. 1 *id.* at 197.

512. 1 *id.*

513. 1 BIOGRAPHICAL DIRECTORY, *supra* note 55, at 377.

514. 1 MONKS, *supra* note 25, at 246-47.

515. 3 DUNN, *supra* note 19, at 1343.

516. 3 *id.*

517. 1 MONKS, *supra* note 25, at 246-47.

518. 2 ENCYCLOPEDIA, *supra* note 353, at 48-51.

519. WHO'S WHO IN AMERICAN LAW, *supra* note 488, at 760.

520. *Id.*

521. *Id.*

522. *Id.*

Justice Sullivan takes a strong interest in juvenile justice matters and has recently published an article in the *Indiana Law Review* on the history of the Indiana juvenile court system.⁵²³

SULLIVAN, JEREMIAH
(Eighth Justice)

Justice Sullivan was born July 21, 1794, in Harrisonburg, Virginia, and died December 6, 1870, in Madison, Indiana.⁵²⁴

After graduating from the College of William and Mary, he studied law and was admitted to the Indiana bar in 1812. In 1819, he was elected to the Indiana General Assembly and won re-election in 1820. Jeremiah Sullivan is credited with proposing the name "Indianapolis" for the capital city. In 1829, he represented Indiana in plans to build a canal between the Wabash River and Toledo, Ohio.⁵²⁵

He served on the Indiana Supreme Court from May 29, 1837, to January 21, 1846. In 1846, he left the Indiana Supreme Court and devoted his time solely to his law practice. In 1869, he was appointed judge of the Jefferson County (Indiana) Criminal Court, and was subsequently elected to the position but died suddenly only three hours before the court convened.⁵²⁶

SWAIM, HARDES NATHAN
(Seventy-third Justice)

Justice Swaim was born November 30, 1890, in Zionsville, Indiana, and died July 30, 1957, in Indianapolis.⁵²⁷

He attended Zionsville High School, graduated from DePauw University in 1913, and received a law degree *cum laude* from the University of Chicago in 1916.⁵²⁸ He joined the U.S. Army in 1917, reaching the rank of first lieutenant with the 87th and the 88th Infantry Divisions.⁵²⁹

He began legal practice in 1916 in Indianapolis. In the early 1930s, he became active in Democratic politics, serving as Marion County Democratic Chairman from 1930 to 1934, 12th District Chairman from 1936 to 1938, and Indianapolis City Controller from 1937 to 1938. In 1938, he was elected to the Indiana Supreme Court on the Democratic ticket. He served on the Indiana

523. Frank Sullivan, Jr., *Indiana as a Forerunner in the Juvenile Court Movement*, 30 IND. L. REV. 279 (1997).

524. 1 MONKS, *supra* note 25, at 202-03.

525. 1 *id.*

526. 1 *id.*

527. *Ailing U.S. Judge Swaim Dies at Home*, INDIANAPOLIS TIMES, July 30, 1957, at 1, reprinted in 49 INDIANA BIOGRAPHY SERIES, *supra* note 2, at 1; *In Memoriam*, 236 INDIANA REPORTS xlviii, xlviii (1956) [hereinafter *Swaim Memoriam*]; WHO'S WHO 2704 (Marquis, 30th ed. 1959).

528. *Swaim Memoriam*, *supra* note 527, at xlvii-L.

529. *Id.*

Supreme Court from January 1, 1939 to January 1, 1945.⁵³⁰

In 1949, President Truman appointed him to the U.S. Seventh Circuit Court of Appeals in Chicago, where he served until his death.⁵³¹

TOWNSEND, HOWARD L.
(Sixtieth Justice)

Justice Townsend was born in 1870, near Eaton, Ohio, and died March 20, 1950, in Florida.

His family moved to Angola, Indiana, where he went to high school. He obtained his A.B. from Bethany College in West Virginia. He returned to Angola to teach Greek, Latin, and mathematics.⁵³² After teaching for a few years, he enrolled at the Chicago Kent College of Law, from which he received an LL.B.⁵³³ He stayed in Chicago for a few years, but practiced law in Fort Wayne from 1904 onward.⁵³⁴

He sat on the Indiana Supreme Court from 1917 to 1923. He was very active in Republican politics. His love of literature and poetry was very well known.⁵³⁵

TRAVIS, JULIUS CURTIS
(Sixty-third Justice)

Justice Travis was born July 31, 1868, in La Porte County, Indiana, and died March 11, 1961, in Indianapolis.

He received an A.B. from the University of Michigan and then an LL.B. in 1894.⁵³⁶ He was manager for the Michigan varsity football and baseball teams for three years, and later was a sports editor for several newspapers, including the *Chicago Tribune*.⁵³⁷

He was a prosecutor for a several years and served two terms on the Indiana Supreme Court, from 1921 until 1933.⁵³⁸ He also served on the Selective Service Appeals Board in World Wars I and II.⁵³⁹

530. *Id.*; *Ailing U.S. Judge Swaim Dies at Home*, INDIANAPOLIS TIMES, July 30, 1957, at 1, reprinted in 49 INDIANA BIOGRAPHY SERIES, *supra* note 2, at 1.

531. *H. Nathan Swaim, U.S. Judge, Dies in Home at Age 66*, reprinted in 60 INDIANA BIOGRAPHY SERIES, *supra* note 2, at 19.

532. *In Memoriam*, 226 INDIANA REPORTS lxxvi, lxxvi (1950).

533. *Id.*

534. *Id.*

535. *Id.* at lxxvi-lxxvii.

536. 4 WHO WAS WHO, *supra* note 227, at 951.

537. *In Memoriam*, 240 INDIANA REPORTS xlvi, xlvi (1961) [hereinafter *Travis Memoriam*].

538. 4 WHO WAS WHO, *supra* note 227, at 951.

539. *Travis Memoriam*, *supra* note 537, at xlix.

TREANOR, WALTER EMANUEL
(Sixty-eighth Justice)

Justice Treanor was born November 17, 1883, in Loogootee, Indiana, and died April 26, 1941, in Indianapolis.⁵⁴⁰

He received an A.B., with honors (1912), an LL.B. (1922), and a J.D. (1923), all from Indiana University.⁵⁴¹ In 1927, he earned a Doctor of Juridical Science (S.J.D.) from Harvard University.⁵⁴² He was a teacher and administrator in the Petersburg public schools for thirteen years.⁵⁴³ He served as a second lieutenant in the U.S. Army during World War I.⁵⁴⁴ He taught law at Indiana University School of Law—Bloomington from 1922 to 1930, and was editor of the *Indiana Law Journal* from 1927 to 1930.⁵⁴⁵ He was elected to the Indiana Supreme Court in 1930 and re-elected for a second term in 1936. He served until December 27, 1937, when he was appointed to the U.S. Court of Appeals for the Seventh Circuit, a position he held until his death in 1941.⁵⁴⁶

TREMAIN, GEORGE LEE
(Seventy-first Justice)

Justice Tremain was born April 6, 1874, near Hartsville, Indiana, and died February 8, 1948, in Greensburg, Indiana.

He received an elementary education in county schools and entered Central Normal (now Canterbury) College in Danville, Indiana, in 1894.⁵⁴⁷ He taught school from 1895 to 1898, and re-entered Central Normal College for the 1898-99 term.⁵⁴⁸ He graduated from the Indiana Law School in Indianapolis in 1900.⁵⁴⁹

He began practicing law in Greensburg in 1901, in association with Judge James K. Ewing.⁵⁵⁰ He formed a partnership with Rollin A. Turner in 1907, specializing in criminal law.⁵⁵¹ In 1934, he was elected to the Indiana Supreme

540. *Treanor Funeral to be Tomorrow*, INDIANAPOLIS STAR, Apr. 28, 1941 at 1, *reprinted* in 22 INDIANA BIOGRAPHY SERIES, *supra* note 2, at 2-3; *In Memoriam*, 219 INDIANA REPORTS xxvi, xxvi (1942) [hereinafter *Treanor Memoriam*]; *but see* WHO WAS WHO, *supra* note 145, at 1251 (giving April 27 as Treanor's date of death).

541. *Treanor Memoriam*, *supra* note 540, at xxvi.

542. *Id.*

543. *Id.*

544. *Id.*

545. *Treanor Funeral to be Tomorrow*, INDIANAPOLIS STAR, Apr. 28, 1941 at 1, *reprinted* in 22 INDIANA BIOGRAPHY SERIES, *supra* note 2, at 2.

546. *Id.*

547. *Ex-Judge G.L. Tremain Dies; Funeral Tomorrow*, INDIANAPOLIS STAR, Feb. 10, 1948, at 12, *reprinted* in 33 INDIANA BIOGRAPHY SERIES, *supra* note 2, at 50.

548. *Id.*

549. *Id.*

550. *In Memoriam*, 227 INDIANA REPORTS xlii, xlii (1950).

551. *Biographical Sketch of George L. Tremain of Greensburg, Candidate for Judge of the Supreme Court*, INDIANAPOLIS PRESS, Apr. 21, 1900 (original publication page unknown), *reprinted*

Court where he served until 1941, taking his rotation in the position of chief justice. In 1941, he returned to the practice of law in Greensburg.⁵⁵²

WILLOUGHBY, BENJAMIN MILTON
(Sixty-first Justice)

Justice Willoughby was born April 8, 1855, in Ripley County, Indiana, and died June 29, 1940, in Vincennes, Indiana.⁵⁵³

He graduated from high school in Vincennes in 1876.⁵⁵⁴ He received an LL.B. from Cincinnati College (now the University of Cincinnati) in 1879, and was admitted to the bar that year. He was an Indiana State Representative from 1895 to 1899, and a judge for the 12th Circuit from 1912 to 1918. He served on the Indiana Supreme Court from 1919 to 1931.⁵⁵⁵

WOODS, WILLIAM ALLEN
(Thirty-first Justice)

Justice Woods was born May 16, 1837, near Farmington in Marshall County, Tennessee, and died June 29, 1901, in Indianapolis.

He graduated from Wabash College in 1859, and was admitted to the Indiana bar in 1861.

William Woods grew up on a farm in Tennessee. Both of his grandfathers were slave holders, but his father and his stepfather raised him with anti-slavery sentiments. His parents were each given a slave girl as a wedding present. They kept the girl as a slave, but declared that she would become free at the age of twenty-one. His father died when he was very young, and his stepfather also died before Woods came of age. After his mother remarried, the family moved to Iowa because of their opposition to slavery, but a male child of the slave girl was left in Tennessee. To obtain his education, Justice Woods agreed to be a hod carrier to pay his tuition. When he was halfway through college and in debt to pay for it, Justice Woods was encouraged to sell the slave boy in Tennessee. To slave traders and owners, the slave boy had become a valuable piece of property. As a testament to his character, Woods not only refused to make a profit on a human being, but he also insisted that the boy be brought north and set free.⁵⁵⁶

He served as an Indiana State Representative in 1867, and as a judge in the 34th Circuit from 1873 to 1881. He was elected to the Indiana Supreme Court in 1880 and served there until 1883, when he was appointed to the U.S. District

in 26 INDIANA BIOGRAPHY SERIES, *supra* note 2, at 16-17.

552. *Ex-Judge G.L. Tremain Dies; Funeral Tomorrow*, INDIANAPOLIS STAR, Feb. 10, 1948, at 12, reprinted in 33 INDIANA BIOGRAPHY SERIES, *supra* note 2, at 50.

553. 1 BIOGRAPHICAL DIRECTORY, *supra* note 55, at 420; but see *In Memoriam*, 219 INDIANA REPORTS xlii, xlii-xliv (1942) [hereinafter *Willoughby Memoriam*] (giving a birth date of May 18, 1855).

554. *Willoughby Memoriam*, *supra* note 553, at xlii.

555. *Id.* at xliv.

556. MEN OF PROGRESS, INDIANA, *supra* note 20, at 386-87.

Court for Indiana.⁵⁵⁷ He remained on that court from 1883 to 1892,⁵⁵⁸ when he was appointed to the U.S. Court of Appeals for the Seventh Circuit, where he served until his death in 1901.⁵⁵⁹

WORDEN, JAMES LORENZO
(Seventeenth Justice)

Justice Worden was born May 10, 1819, in Sandisfield, Massachusetts, and died June 10, 1884, in Fort Wayne, Indiana.

He received his early education in the Ohio public schools. He began studying law in 1838 and was admitted to the Ohio bar in Lancaster, Ohio, in 1841. He opened his first law office at Tiffin, Ohio, and practiced there until 1844, when he moved to Columbia City, Indiana.⁵⁶⁰ In 1846, he opened a law office in Fort Wayne where he lived the rest of his life. He became the prosecutor for the 10th Indiana Judicial Circuit in 1851. He was appointed to the 10th Indiana Judicial Circuit Court in 1855, and was later elected for a six-year term.⁵⁶¹ He served until 1858, when he was appointed to the Indiana Supreme Court to fill the vacancy created by Justice William Stuart's resignation.⁵⁶² He was re-elected for three subsequent terms. He had served continuously for almost twenty-five years as a Justice of the Indiana Supreme Court when he left the bench on December 1, 1882.⁵⁶³

YOUNG, HOWARD SLOAN, SR.
(Seventy-sixth Justice)

Justice Young was born August 7, 1879, in Indianapolis, and died October 14, 1961, in Indianapolis.

He graduated from the University of Chicago in 1898, and received a law degree from the Indiana Law School in 1903. He was admitted to the Indiana bar in 1903.⁵⁶⁴ He was U.S. Commissioner from 1920 to 1944. He practiced law from 1904 to 1944. He began as a solo practitioner, joined the law firm of Elam, Fesler, Elam & Young in 1916 and remained in the firm when it reorganized as Fesler, Elam, Young, & Fauvre in 1932.⁵⁶⁵ He served as president of the Indianapolis Bar Association from 1931 to 1932, and as a member of the Indianapolis School Board.⁵⁶⁶ He was elected to the Indiana Supreme Court in

557. *Id.*

558. *Id.*

559. 1 BIOGRAPHICAL DIRECTORY, *supra* note 55, at 428; 1 ENCYCLOPEDIA, *supra* note 353, at 12-15; WHO WAS WHO, *supra* note 342, at 595.

560. 3 MONKS, *supra* note 25, at 1431.

561. 3 *id.*

562. 3 *id.* at 1432.

563. 3 *Id.*

564. Harvey Grabill et al., *In Memoriam*, 241 INDIANA REPORTS xliii, xliii (1962).

565. *Id.*

566. *Id.*

1944 and served from January 1, 1945 to January 1, 1951, at which time he returned to the practice of law with his son, Howard S. Young, Jr.⁵⁶⁷

ZOLLARS, ALLEN
(Thirty-third Justice)

Justice Zollars was born September 3, 1839, in Licking County, Ohio, and died December 20, 1909, in Fort Wayne, Indiana.

He graduated from Denison University in Granville, Ohio, in or about 1863 with an A.B. He briefly studied law in Ohio before he entered the University of Michigan Law School, where he received an LL.B. in 1866.⁵⁶⁸ He was the Fort Wayne City Attorney from 1869 to 1875, and appointed as the first judge of the Allen Superior Court in 1877.⁵⁶⁹ He was an Indiana State Representative in 1869, and served as an Indiana Supreme Court Justice from 1883 to 1889. He ran for a second term in 1888, but was defeated along with the rest of the Democratic ticket that year.⁵⁷⁰

567. *Howard Young Dies; High Court Ex-Judge*, INDIANAPOLIS STAR, Oct. 15, 1961, sec. 3, at 23, reprinted in 58 INDIANA BIOGRAPHY SERIES, *supra* note 2, at 119; 6 WHO WAS WHO 452 (Marquis, 1976); *In Memoriam*, 241 INDIANA REPORTS xliii, xliii-xliv (1962).

568. 1 BIOGRAPHICAL DIRECTORY, *supra* note 55, at 434.

569. *Id.*

570. *Id.*; MEN OF PROGRESS, INDIANA, *supra* note 20, at 130-32.

Members of the Indiana Supreme Court		
NAME	TERM	REMARKS.
1. John Johnson	December 28, 1816-September 10, 1817	Died in office.
2. James Scott	December 28, 1816-December 28, 1830	
3. Jesse Lynch Holman	December 28, 1816-December 28, 1830	
4. Isaac Newton Blackford	September 10, 1817-January 3, 1853	Appointed to fill the vacancy created by the death of Judge Johnson.
5. Stephen C. Stevens	January 28, 1831-May 30, 1836	Resigned to practice law in Madison, Indiana.
6. John Taliaferro McKinney	January 28, 1831-May 29, 1837	Died in office.
7. Charles Dewey	May 30, 1836-January 29, 1847	Appointed to fill the vacancy created by the resignation of Judge Stevens. He was rejected by the Senate twice before he was confirmed.
8. Jeremiah Sullivan	May 29, 1837-January 21, 1846	
9. Samuel Elliot Perkins	January 21, 1846-January 3, 1853	Appointed to fill the vacancy created by the death of Judge McKinney.
10. Thomas L. Smith	January 29, 1847-January 3, 1853	
9. Samuel Elliot Perkins	January 3, 1846-January 3, 1865 January 1, 1877-December 17, 1879	The only Justice to serve on the Indiana Supreme Court under the Indiana Constitution of 1816 and the Indiana Constitution of 1851.
11. Andrew Davison	January 3, 1853-January 3, 1865	
12. Addison Locke Roache	January 3, 1853-May 8, 1854	Resigned to become President of the Indiana & Illinois Central Railroad.
13. William Z. Stuart	January 3, 1853-January 3, 1858	Resigned because of salary and became attorney for the Toledo & Wabash Railroad.
14. Alvin Peterson Hovey	May 8, 1854-December 10, 1855	Appointed to fill the vacancy created by the resignation of Justice Roache. Elected Governor in 1888.

15. Samuel Barnes Gookins	October 10, 1854- December 10, 1857	Resigned due to ill health and low pay. Elected to fill the vacancy created by the resignation of Justice Roache (completing the appointment of Justice Hovey).
16. James McLean Hanna	December 10, 1857-January 3, 1865	Appointed to fill vacancy created by resignation of Justice Gookins. Justice Hanna was elected at the next regular election.
17. James Lorenzo Worden	January 16, 1858-January 3, 1865	Appointed to fill the vacancy created by the resignation of Justice Stuart. Horace P. Biddle had been elected in the fall of 1857, but Governor Willard refused to issue him a commission. Biddle brought mandamus proceedings against the governor, but the supreme court decided (January 15, 1858) in favor of the governor. Justice Worden was elected at the next election.
	January 3, 1871- December 2, 1882	Resigned to become Allen County Superior Court Judge.
18. James S. Frazer	January 3, 1865-January 3, 1871	
19. Jehu Tindle Elliott	January 3, 1865-January 3, 1871	
20. Charles A. Ray	January 3, 1865-January 3, 1871	
21. Robert Crockett Gregory	January 3, 1865-January 3, 1871	
22. John Pettit	January 3, 1871-January 3, 1877	
23. Alexander Cummings Downey	January 3, 1871-January 3, 1877	
24. Samuel Hamilton Buskirk	January 3, 1871-January 3, 1877	
25. Andrew Lawrence Osborn	December 1872-January 4, 1875	Appointed by Governor Baker in December, 1872, with the organization of the Fifth Indiana Supreme Court District.
26. Horace Porter Biddle	January 4, 1875-January 3, 1881	
27. William Ellis Niblack	January 4, 1877-January 3, 1889	
28. George Vail Howk	January 4, 1877-January 3, 1889	
29. John T. Scott	December 29, 1879-January 5, 1881	Appointed to fill the vacancy created by the death of Justice Perkins.

30. Byron Kosciusko Elliott	January 3, 1881-January 2, 1893	
31. William Allen Woods	January 3, 1881-May 8, 1883	Resigned to become a U.S. District Court Judge. Later appointed to the U.S. Court of Appeals for the 7th Circuit.
32. William H. Coombs	December 2, 1882-January 1, 1883	Appointed to fill the vacancy created by the resignation of Justice Worden.
33. Allen Zollars	January 3, 1883-January 7, 1889	
34. Edwin Pollock Hammond	May 14, 1883-January 6, 1885	Appointed to fill the vacancy created by the resignation of Justice Woods.
35. Joseph A.S. Mitchell	January 6, 1885-December 12, 1890	Died in office. Term completed by Justice McBride.
36. Silas D. Coffey	January 7, 1889-January 7, 1895	
37. Walter Olds	January 7, 1889-June 15, 1893	Resigned to practice law in Chicago.
38. John G. Berkshire	January 17, 1889-February 19, 1891	Died in office. Term completed by Justice Miller.
39. Robert Wesley McBride	December 17, 1890-January 2, 1893	Appointed to fill the unexpired term of Justice Mitchell. McBride had been defeated by Mitchell in the November, 1890 election.
40. John Donnell Miller	February 25, 1891-January 2, 1893	Appointed to fill the unexpired term of Justice Berkshire.
41. Leonard J. Hackney	January 2, 1893-January 2, 1899	
42. James McCabe	January 2, 1893-January 2, 1899	
43. Timothy Edward Howard	January 2, 1893-January 2, 1899	
44. Joseph S. Dailey	July 25, 1893-January 7, 1895	Appointed to fill unexpired term of Justice Olds.
45. James Henry Jordan	January 7, 1895-April 10, 1912	Died in office.
46. Leander John Monks	January 7, 1899-January 7, 1913	
47. Alexander Dowling	January 2, 1899-January 2, 1905	
48. John Vestal Hadley	January 2, 1899-January 2, 1911	

49. Francis E. Baker	January 2, 1899-January 25, 1902	Resigned to become U.S. Circuit Judge. Term completed by Justice Gillett.
50. John Henry Gillett	January 25, 1902-January 4, 1909	Appointed to fill the unexpired term of Justice Baker.
51. Oscar Hilton Montgomery	January 2, 1905 -January 2, 1911	
52. Quincy Alden Myers	January 4, 1909-January 4, 1915	
53. John Wesley Spencer	April 15, 1912-January 7, 1918	Appointed to fill vacancy created by the death of Justice Jordan.
54. Douglas Morris	January 2, 1911-January 1, 1917	
55. Charles Elbridge Cox	January 2, 1911-January 1, 1917	
56. Richard Kenny Erwin	January 6, 1913-October 15, 1918	Died in office.
57. Moses Barnett Lairy	January 4, 1915-January 3, 1921	
58. David A. Myers	January 1, 1917-December 31, 1934	
59. Lawson Moreau Harvey	January 1, 1917-June 25, 1920	Died in office.
60. Howard L. Townsend	October 1917-November 1, 1923	Appointed in 1917 to fill the vacancy created by the death of Justice Erwin. Resigned.
61. Benjamin Milton Willoughby	January 6, 1919-January 7, 1931	
62. Louis B. Ewbank	August 1, 1920-January 3, 1927	Appointed to fill the vacancy caused by the death of Justice Harvey.
63. Julius Curtis Travis	January 3, 1921-January 3, 1933	
64. Fred C. Gause	November 1, 1923-January 5, 1925	Appointed to fill the vacancy created by the resignation of Justice Townsend.
65. Willard Benharrell Gemmill	January 5, 1925-January 4, 1931	
66. Clarence R. Martin	January 3, 1927-January 3, 1933	
67. Curtis William Roll	January 5, 1931-January 4, 1943	

68. Walter Emanuel Treanor	January 8, 1931-December 27, 1937	Resigned to become judge of the U.S. Court of Appeals for the 7th Circuit.
69. Michael Louis Fansler	January 4, 1933-January 1, 1945	
70. James Peter Hughes	January 3, 1933-January 1, 1936	
71. George Lee Tremain	January 1, 1935-December 31, 1940	
72. Curtis Grover Shake	January 4, 1938-January 7, 1946	Appointed January 4, 1938 to fill the vacancy created by the resignation of Justice Treanor.
73. Hardses Nathan Swaim	January 1, 1939-January 1, 1945	
74. Frank Nelson Richman	January 6, 1941-January 6, 1947	
75. Martin "Mart" Joseph O'Malley	January 4, 1943-January 3, 1949	
76. Howard Sloan Young, Sr.	January 1, 1945-January 1, 1951	
77. Oliver Starr	January 1, 1945-January 1, 1951	
78. Frank Earl Gilkison	January 1, 1945-February 25, 1955	Died in office. Term completed by Justices Henley and Arterburn.
79. James A. Emmert	January 7, 1946-January 5, 1959	
80. Paul George Jasper	January 3, 1949-March 31, 1953	Resigned to take position with Public Service Indiana. Term completed by Justice Flanagan.
81. Archie "Arch" Newton Bobbitt	January 2, 1951-January 7, 1963	
82. Floyd S. Draper	January 2, 1951-January 10, 1955	Resigned. Term completed by Justices Levine and Landis.
83. Dan Collins Flanagan	April 1, 1953-December 31, 1954	Appointed to fill the vacancy created by resignation of Justice Jasper.
84. Harold E. Achor	January 3, 1955-December 12, 1966	Retired due to illness. Term completed by Justice Rakestraw.
85. Isadore Edward Levine	January 13, 1955- May 23, 1955	Appointed January 13, 1955 to fill vacancy created by the resignation of Justice Draper. Resigned May 23, 1955.

86. George W. Henley	March 15, 1955- May 23, 1955	Appointed March 15, 1955 to fill vacancy created by the resignation of Justice Gilkison. Resigned May 23, 1955.
87. Frederick Landis, Jr.	May 23, 1955-November 8, 1965	Appointed May 23, 1955 to fill the vacancy created by the resignation of Justice Levine. Resigned to accept a seat on the United States Court of Customs Appeals.
88. Norman Frank Arterburn	May 23, 1955-May 13, 1977	Appointed to fill the vacancy created by the resignation of Justice Henley. Retired in May 1977. Term completed by Justice Pivarnik.
89. Amos Wade Jackson	January 5, 1959-January 4, 1971	
90. Walter Myers, Jr.	January 7, 1963-June 2, 1967	Died in office.
91. Frederick Eugene Rakestraw	January 7, 1966-January 2, 1967	Appointed to fill the vacancy created by the death of Justice Achor.
92. Donald Roosevelt Mote	January 3, 1967-September 17, 1968	Died in office. Term completed by Roger O. DeBruler.
93. David M. Lewis	June 21, 1967-January 6, 1969	Appointed to fill the vacancy created by the death of Justice Myers.
94. Donald Herbert Hunter	January 2, 1967-September 6, 1985	First to be elected under provision of 10 year terms. Retired. Succeeded by Justice Shepard.
95. Roger O. DeBruler	September 30, 1968-August 8, 1996	Appointed to fill the vacancy created by the death of Justice Mote. Retired. Term completed by Justice Boehm.
96. Richard M. Givan	January 6, 1970-January 4, 1995	Retired. Term completed by Justice Selby.
97. Dixon Wright Prentice	January 4, 1971-December 1985	Retired. Term completed by Justice Dickson.
98. Alfred J. Pivarnik	May 13, 1977-December 14, 1990	Appointed to fill the vacancy created by the resignation of Justice Arterburn. Retired. Term completed by Justice Krahulik.
99. Randall Terry Shepard	September 6, 1985-	Appointed to fill the vacancy created by the retirement of Justice Hunter. Retained by election of November 8, 1988. Current term expires December 31, 1998.
100. Brent E. Dickson	January 6, 1986-	Appointed by Governor Robert D. Orr to fill vacancy created by retirement of Justice Prentice. Retained by election of November 8, 1988. Current term expires December 31, 1998.

101. Jon D. Krahulik	December 14, 1990-October 31, 1993	Appointed to fill the vacancy created by the retirement of Justice Pivarnik. Resigned to pursue business opportunities.
102. Frank Sullivan, Jr.	November 1, 1993-	Appointed to fill the vacancy created by the resignation of Justice Krahulik.
103. Myra Consetta Selby	January 4, 1995-	Appointed to fill the vacancy created by the retirement of Justice Givan.
104. Theodore Reed Boehm	August 8, 1996-	Appointed to fill the vacancy created by the retirement of Justice DeBruler.

THE ORIGIN AND DEVELOPMENT OF THE INDIANA BAR EXAMINATION

S. HUGH DILLIN*

It has been 180 years since Indiana achieved statehood, but for only sixty-five of those years has the state required that persons desiring to practice law pass a bar examination. In fact, the constitution of 1816 did not mention attorneys. However, article VII, section 21 of the constitution of 1851 provided: “Every person of good moral character, being a voter, shall be entitled to admission to practice law in all courts of justice.” Although this provision covered male citizens, it did nothing for women who were not entitled to vote at that time.

This constitutional provision remained the law for a little over eighty years, during which time county bar associations adopted their own ways of determining good moral character. Some, for instance, actually conducted an adversary hearing in which the applicant had the burden of proving the quality of his character with questions on the law deemed germane to the proceeding. In other counties, it was the custom to admit retiring county clerks to the bar on their last day of service in office. This custom was sometimes stretched to include retiring county recorders. There was a certain member of the bar in Pike County of whom it was said, with reference to his legal education, that he had graduated *cum laude* from the county recorder’s office. The remark ceased to be quite so humorous when this individual was elected judge of the circuit court and favored the taxpayers with six years of judges pro tempore.

At the 1881 session of the Indiana General Assembly, Senate Joint Resolution 14 was proposed to amend article VII, section 21 to extend the right to practice law to a non-citizen who had declared an intention to become one, if that person had attained twenty-one years of age and was of good moral character. The committee to which the proposed resolution was referred recommended that it be amended to strike article VII, section 21 of the constitution. The amendment was adopted, but the joint resolution was not. The committee’s action was the first attempt to repeal that provision. It would take another fifty years to get the job done.

In 1892, Benjamin Harrison was defeated for re-election as President of the United States, and returned to his law practice in Indianapolis. In June 1896, he invited a group of Indiana lawyers to meet with him for the purpose of organizing the Indiana State Bar Association. This was done, and Harrison was made president of the bar association. From that time forward, the bar association had as one of its major objectives the repeal of article VII, section 21.

The method for amending the Indiana Constitution appears in article XVI, section 1 as follows:

* Senior Judge, United States District Court, Southern District of Indiana. A.B., LL.B., LL.D., Indiana University. Judge Dillin delivered this speech at the History of Indiana Courts Symposium. Although the speech has been edited for publication, it is not intended to be an authoritative statement of the law but, rather, the observations of an active participant in the adoption of an Indiana Bar Examination requirement. For these reasons, the writing has very few citations to authority.

Any amendment or amendments to this Constitution, may be proposed in either branch of the General Assembly; and, if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall, with the yeas and nays thereon, be entered on their journals, and referred to the General Assembly to be chosen at the next general election; and if, in the General Assembly so next chosen, such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each House, then it shall be the duty of the General Assembly to submit such amendment or amendments to the electors of State; and if a majority of said electors shall ratify the same, such amendment or amendments shall become a part of this Constitution.

At the 1897 session of the general assembly, Senate Joint Resolution 5 was proposed to amend article VII, section 21 to allow the general assembly to prescribe qualifications to practice law in Indiana. The resolution was adopted and signed by the governor. As required by article XVI, section 1, the amendment was again submitted to and adopted by the general assembly at its 1899 session, signed by the governor, and submitted to the electorate in the general election of 1900. At the election the proposed amendment drew 240,031 votes for, and 144,072 against. However, there were 655,965 votes cast for the candidates for governor.

On the assumption that the proposed amendment had been adopted, and that the general assembly had failed to prescribe qualifications, the Marion Circuit Court adopted rules and appointed a board of examiners. Thereafter, one George L. Denny applied to be admitted to practice law in the Marion Circuit Court, with qualifications only that he was a person of good moral character and a voter in Marion County. He declined to submit to an examination on the law. His application was denied. On appeal, the Indiana Supreme Court held that the amendment had not been adopted, following its decision in *State v. Swift*.¹ *Swift* had interpreted article XVI, section 1 of the constitution to mean that when a proposed amendment is required to be submitted at a certain general election, and is made to depend upon a majority of the votes cast at "such election," a majority of *all* votes cast at the election is meant, not merely a majority of the votes cast on that particular question. Because the total of the votes cast for the amendment at the 1900 election was less than a majority of the total votes cast at the election, the amendment did not receive a constitutional majority. Therefore, the judgment of the Marion Circuit Court was reversed.² Presumably Mr. Denny enjoyed a long and lucrative practice; after all, he won his first case in the supreme court.

In 1903 and 1905, the general assembly again adopted a joint resolution proposing to amend article VII, section 21 exactly as had been proposed in 1897 and 1899. When the proposed amendment was submitted to the voters in the general election of 1906, it received more than three-fourths of the votes cast on it, but once again failed for want of a constitutional majority. In 1907 and 1909,

1. 69 Ind. 505 (1880).

2. *In re Denny*, 59 N.E. 359 (Ind. 1901).

the general assembly once again enacted the joint resolution, which went before the voters in 1910 with the same result.

Following the 1910 election, one Charles W. Boswell, another pure but unlettered voter, applied for admission to the Marion County Bar, no doubt citing *Denny*. However, an objection was made, and the circuit court held a trial, finding against Boswell, who appealed. The supreme court noted that the proposed amendment, which it referred to as the “Lawyer’s Amendment,” had been before the legislature for many years and submitted to the people three times, always with a majority of the votes cast on the amendment in favor of ratification. However, it followed *Swift* and *Denny* and held that the proposed amendment had again failed for lack of receiving a majority of the total votes cast for state offices at the same election.³ Mr. Boswell thus joined Mr. Denny as one who won his first case in the supreme court. Whether they entered into a partnership is unknown.

In 1929 and 1931, the Lawyer’s Amendment was once again adopted by the general assembly and submitted to the voters at the general election of November 1932.⁴ Once again, a substantial majority of the votes cast on the amendment were for ratification, but it lacked a constitutional majority. The general assembly of 1931, perhaps anticipating the result of the 1932 popular vote, also enacted the following: “The supreme court of this state shall have exclusive jurisdiction to admit attorneys to practice law in all courts of the state under such rules and regulations as it may prescribe.”⁵

In July 1931, the supreme court adopted rules which, among other things, required an applicant to take an examination to determine his professional fitness. Whether the court acted illegally in adopting these rules in view of article VII, section 21 and *Swift*, *Denny*, and *Boswell*, is left for your consideration. In any event, in 1934, one Lemuel S. Todd, a voter twenty-one years of age and of good moral character, but innocent of legal training, applied to the supreme court for admission to practice insisting that neither the general assembly nor the court could require an examination in light of article VII, section 21. Amici curiae briefs filed by the Indiana State Bar Association suggested that the petition be dismissed. The court acknowledged that it would be necessary to overrule the above mentioned cases to hold that the 1932 amendment was valid, and then proceeded to do so in a fifteen page majority opinion written by Judge Walter E. Treanor.⁶ The phrase “majority of [] electors,” as contained in article XVI, section 1, of the constitution was now redefined to mean a majority of persons who vote on a proposed amendment, rather than a majority of all persons who vote at the election. The amendment was held to be adopted, and article VII, section 21 was eliminated from the constitution.

The bar examination requirement had thus been legitimized, after the fact. However, this was not the end of the fight. In the 1937 session of the general assembly, Senate Bill 195 attempted to place the bar examination under the

3. *In re Boswell*, 100 N.E. 833 (Ind. 1913).

4. *See* Act of Mar. 11, 1931, ch. 157, § 2(2), 1931 Ind. Acts 553.

5. Act of Mar. 5, 1931, ch. 64, § 1, 1931 Ind. Acts 150.

6. *In re Todd*, 193 N.E. 865 (Ind. 1935).

supervision of the Judicial Council, rather than the supreme court. The bill passed the senate by an overwhelming vote of 41 to 1. Senate Bill 195 was also passed by the house, but only after it was amended by striking out everything after the enacting clause and substituting an anti-horse-racing bill. The senate indignantly refused to concur in the amendment.

At the same 1937 session, House Bill 189 would have repealed the 1931 act which gave the supreme court exclusive jurisdiction over bar admissions. House Bill 189 was assigned to Judiciary B, the "graveyard" committee, and was not heard from again. However, House Bill 134, a similar attack on the bar examination, was referred to the Committee on Organization of Courts, and a majority of the committee referred it back to the house with the recommendation that it be indefinitely postponed.

By 1937, a large number of persons without law school training had flunked the bar examination, and they and their friends, relatives, and fiancées, constituted a vigorous and vocal lobby in favor of the bill eliminating the examination requirement. They had, of course, lobbied their various representatives, with the result that the debate on the committee recommendation was loud and long. The name of Abraham Lincoln, who had practiced law quite successfully without attending law school, was invoked many times. The final, and perhaps deciding, speech was made by a freshman representative who was himself a junior in the Indiana University School of Law at Bloomington. If the bill was enacted, he would not have to take the bar examination, but he stated that he was willing to take the examination and thought that it was in the public interest to require all applicants do so. The bill was killed. I was that student-representative. (When I was confronted with the exam the following year, I questioned my chutzpah.)

In the 1939 general assembly, bills were offered in both the house and the senate to abolish the State Board of Bar Examiners. The house bill would have placed admission with each circuit (i.e., each county), and the senate bill would have placed admission with the Judicial Council—whatever that was. Both bills were defeated. This was the high water mark of the anti-examination movement, and since that time the board has been plagued only by the predictable grumbling of unsuccessful candidates.

The first State Board of Bar Examiners was appointed by the supreme court in 1931. It consisted of five attorneys, one selected by each judge from his own judicial district. The Board administered its first examination the same year. The examination consisted of fifty essay-type questions to be answered over two days. The same selection procedure for bar examiners is used today, except that each supreme court justice selects two board members from his or her own district to serve for a term of five years. Indiana is now one of only four states which use the essay-type questions. The examination still takes two days, but the board is getting a little soft: instead of fifty questions, applicants must answer only twenty-five out of twenty-eight. The board members write and grade their own questions, which doubtless explains why they do not ask so many, considering that over 700 applicants per year take the examination. Applicants must also pass the Multistate Professional Responsibility Examination (MPRE) within two years before or after passing the essay examination.

Until recently, Admission and Discipline Rule 13 required that an applicant

for admission to the bar have graduated from an approved law school (or was certified by the Dean of the school as being in line to graduate as a matter of course), and that the person have completed a given number of semester hours in a dozen designated basic courses, such as contracts, torts, and commercial law. On February 1, 1996, the Indiana Supreme Court abolished the latter requirement, to the surprise of many. This will no doubt please those schools which delight in offering exotic courses which have little relation to the real life of a lawyer. However, students should note that applicants will continue to be examined in the same subject areas as before, rather than, for instance, a new course such as Ballroom Dancing and the Law.

In any event, the bar examination is here to stay, and the essay test is surely the best test of both knowledge and writing ability. We do not anticipate any great changes in the near future.

LAWYERS AND JUDGES AS FRAMERS OF INDIANA'S 1851 CONSTITUTION*

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THOMAS A. JOHN***

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The present Constitution of the State of Indiana is the product of the Constitutional Convention of 1850-51. Although modified by various amendments, the original document remains the basis for the present organization and structure of Indiana's government and legal system. Its limits on government powers and its guarantees of liberty and individual rights provide basic protections for Indiana citizens today. Yet all of this rests on the ideas and actions of convention delegates 145 years ago. More than one-third of the 154 delegates who served at the convention were trained in the law. Which of the proposals they offered or supported found their way into the 1851 Constitution? Did they seem to focus on certain types of issues? Did they play a particularly significant part in the organization and operation of the convention? Did any of the delegates to the convention go on to serve as judges, and if so, did they author any state constitutional law opinions that reflect insight they gained as members of the convention? The answers to such questions can be surprising.

The convention that drafted the 1851 Constitution assembled in the House chambers of the old Capitol building in Indianapolis on October 7, 1850.¹ Among the delegates were fifty-six men who were attorneys, had studied law, or were, or would become, judges.² Three of the men who later worked as judges eventually

* This Paper is essentially a transcription of remarks delivered at the Symposium entitled *The History of Indiana Courts: People, Legacy and Defining Moments*, held at the Indiana University School of Law—Indianapolis, on March 1, 1996. Much of the information in this speech was generally gleaned from the records of the convention. REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA (1850) (2 volumes); 1851 JOURNAL OF THE CONVENTION OF THE PEOPLE OF THE STATE OF INDIANA TO AMEND THE CONSTITUTION (Indianapolis, A.H. Brown 1851). However, due to the fact that this Paper was originally given as a speech, there will not be particular footnotes for each individual fact which was obtained from the convention records.

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1. The convention was held in the House chambers until December 26, 1850, when it was moved to the Masonic Hall in Indianapolis. The delegates continued to meet at this location, at a cost of twelve dollars a day in rent, until the convention's conclusion on February 10, 1851. William W. Thornton, *The Constitutional Convention of 1850*, 1902 REPORT OF THE SIXTH ANNUAL MEETING OF THE STATE BAR ASSOCIATION OF INDIANA 180.

2. This topic presents the difficulty of determining which delegates should be deemed lawyers and which should not. For purposes of the numbers used in this paper, any delegates who

sat on the Indiana Supreme Court. In addition, there were twelve others at the convention who sat as judges on lower state courts. The list of attorneys who had distinguished themselves, or would do so in the future, is substantial. It includes a U.S. Vice-President, Thomas Hendricks; two U.S. Senators, Hendricks and John Pettit; two Indiana governors, Hendricks and Alvin P. Hovey; an Indiana Lieutenant Governor, Samuel Hall; a U.S. Judge Advocate General, William McKee Dunn; an Indiana Supreme Court reporter, Horace Carter; two ministers to foreign countries, Hovey and James Borden; a Civil War General, Hovey; and finally, a number of U.S. Congressmen and members of the Indiana General Assembly.³ Despite the prominent legal leadership at the convention, a non-attorney, George W. Carr from Lawrence County, was elected president.

Twenty-four standing committees were formed at the convention, and of these, attorneys sat on nineteen. Lawyers were heavily represented on five of these committees: Finance and Taxation (70% lawyers); Miscellaneous Provisions (80% lawyers); and Revision, Arrangement and Phraseology (52% lawyers); as well as, not surprisingly, Organization of the Courts (92% lawyers); and Matters Pertaining to the Criminal Law (86% lawyers). Unfortunately, it is virtually impossible to get a clear picture of what contributions individual attorneys made on these committees, because no records of the committee proceedings have apparently been preserved. Three committees included no attorney members: State Officers Other than Executive and Judiciary; Future Amendments to the Constitution; and Accounts.

Interestingly, the Future Amendments Committee substantially departed from Indiana's original 1816 Constitution as to the method for making changes in the constitution. The former constitution had provided for the state's electorate to vote every twelve years on the question of holding a new constitutional convention. Through this system there existed an invitation to the people to reconsider the constitution regularly. The 1851 Constitution, in contrast, replaced the periodic convention referendum concept with that of making changes by amendment through a rather rigorous and difficult process, which was not very conducive to the adoption of amendments.

In terms of the quantity of resolutions proposed, attorney delegates did not outproduce the other delegates. Of the fifty-six attorney delegates, twenty-one of them did not introduce any substantive resolutions. The other thirty-five introduced 118 resolutions. Altogether, the attorney delegates, comprising 36%

practiced law, were judges at any point during their lifetimes, or studied law (but never practiced) are considered lawyers. *See generally* 1 A BIOGRAPHICAL DIRECTORY OF THE INDIANA GENERAL ASSEMBLY, 1816-1899 (Rebecca A. Shepherd et al. eds., 1980) (available in the William H. English Collection in the William Henry Smith Memorial Library, Indiana Historical Society). Numbers somewhat, though not inherently, conflicting were presented by William W. Thornton in a speech given to the State Bar Association in 1902. Mr. Thornton stated that "[t]he delegates consisted of 62 farmers, 39 lawyers, 16 physicians, 11 merchants and traders, 2 teachers, 2 manufacturers, 2 surveyors, 1 tanner, 1 carpenter, 1 millwright, 1 county recorder, 1 accountant, 1 miller, 1 baker, 1 editor" and seven men whose trades were unknown. *See* Thornton, *supra* note 1, at 176.

3. Thornton, *supra* note 1, at 176.

of the total convention delegation, provided 36% of the total number of resolutions introduced.

However, the attorney delegates at the convention made significant contributions to certain areas of debate, including women's rights, African-American suffrage and citizenship, proposed abolition of the death penalty, special legislation, equal privileges, and the organization of the courts.

Although Professor Daniel Read of Monroe County was the delegate who introduced our Privileges and Immunities Clause, a number of attorneys contributed to the discourse on this topic.⁴ During these debates, Alvin Hovey moved to amend the proposed provision to offer an even broader set of protections than those eventually adopted. Many attorneys, including Hovey, Thomas Smith, Horace Biddle, John Niles, and Samuel Hall, contributed to the debate on this subject.

The organization of Indiana's courts, as would be expected, was another area of debate to which attorneys contributed significantly. Samuel Hall introduced a resolution that called for the abolition of the distinction between courts of law and courts of equity. This provision, along with those submitted by James Borden, Joseph Robinson, Hiram Allen, and Elias Terry, provided the foundation for Indiana's judicial system for the next 120 years. These provisions laid out the structure of the court system, the elections of prosecuting attorneys and attorneys general, and the groundwork for Indiana's pleading and practice. These reforms likely could not have been effectuated by a delegation that lacked members of the legal community. An interesting feud developed between two prominent attorneys—in fact, two future Indiana Supreme Court judges—on the question of whether Indiana should continue to use grand juries. Horace Biddle led the argument in favor of retaining the prevailing grand jury system, and John Pettit led the argument in favor of dismantling it. This debate encompassed a discussion of the purpose of a grand jury and whether any benefits provided by the system justified its cost. The discourse eventually culminated in article VII, section 17 of the constitution, which grants the general assembly the power to modify or abolish the grand jury system.

Daniel Kelso, another attorney delegate, submitted a resolution to abolish the death penalty. Although his proposal was tabled and failed to become part of the Indiana Constitution, it demonstrated Kelso's willingness to venture into new territory, even against prevailing sentiment. This tendency is exhibited in some of the comments he made on other subjects as well, such as the rights of women to own property.

Despite the significant contingent of lawyers at the convention, some of the constitutional provisions adopted actually targeted legal professionals themselves. The first of these, the original article VII, section 6, was aimed, curiously, at a specific judge then sitting on the Indiana Supreme Court. This section, no longer in effect today, required the legislature to provide for the speedy publication of the supreme court's opinions and prohibited judges from publishing these opinions

4. 2 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA 1393 (1850) [hereinafter REPORT].

themselves. This provision, introduced by future Supreme Court Judge Alvin Hovey, is believed to have been placed in the 1851 Constitution because of the popular sentiment that Supreme Court Judge Isaac Blackford, who had been publishing the Court's opinions, had been neglecting his judicial duties in order to devote time to publication activities and had been profiting excessively from that venture.⁵

Another provision no longer on the books, article VII, section 21, arguably resulted from a backlash against privileged classes generally and lawyers in particular. This section guaranteed any voter "of good moral character" the right to practice law. It was not until early in this century that this provision was repealed, thereby making possible the development of law schools and bar examinations.

The stances taken by various attorneys on opposite sides of some divisive issues are observable in the context of the debate on African-American suffrage and citizenship. Attorney Beattie McClelland made a motion to remove the voting restrictions on Blacks and those of mixed race, but the motion was rejected by the convention at large. Other attorneys, including John Beard, Erastus Bascom, James Borden, and Henry Thornton, introduced similar provisions designed to grant Blacks voting and property rights. However, all of these provisions were also soundly defeated, and a greater number of attorney delegates—including Alvin Hovey—were among the opponents of these measures rather than among their supporters.⁶

Although difficult to discern from the document that eventually passed, the status of Indiana women was a much-talked-about topic at the 1850-1851 Convention. Debated vigorously and at great length were resolutions attempting to give women certain limited rights—particularly Robert Dale Owen's resolution attempting to give married women property rights separate from their husbands'. Owen, by far the most vocal advocate of women's rights, was not a lawyer. But several other women's rights resolutions were offered by lawyers, including one by Judge Borden, of Allen County, which was not much different from Owen's resolution, and was actually submitted before Owen first proposed his resolution. Attorney Daniel Kelso succeeded in improving the Owen resolution by expanding it to cover all married women; the original proposal covered only "women

5. LOGAN ESAREY, *HISTORY OF INDIANA FROM ITS EXPLORATION TO 1850*, at 457 n.18 (1970).

6. The views of these attorney delegates appear to have been representative of those of the population of Indiana at that time. On August 4, 1851, there were 109,319 votes cast on the issue of whether to adopt the constitution. Of this number, 82,564, or 76%, voted in favor of its adoption. Taken contemporaneously with the vote on the adoption of the constitution was a separate vote on a proposed constitutional provision for the exclusion and colonization of "Negroes and Mulattoes." That provision passed with an 81% majority vote (88,910 out of 109,967). The original Article XIII was found by the Indiana Supreme Court to be repugnant to the Article IV Privileges and Immunities Clause of the U.S. Constitution and to federal legislation passed thereunder, in the case of *Smith v. Moody*, 26 Ind. 299 (1866), and was repealed by amendment in 1881.

hereafter married in this state.” On Kelso’s motion, the word “hereafter” was struck from Owen’s proposal.⁷ William Steele—who, though not a practitioner, had studied law—sought the inclusion in the constitution of a requirement that the legislature provide by law “the right of petition to all white females of the age of eighteen and upward . . . for such laws as will tend to protect their best interest and that of their posterity.”⁸

The voices of attorneys also significantly contributed to what might be called a middle viewpoint in the discourse. Many indicated concern for protecting family harmony and feared that granting general property rights to married women would be inconsistent with that goal. However, several wanted to confer rights upon widows, who they felt were being treated unfairly by the current system. Those who spoke on this question referred to the estate laws of the time and the injustices they had seen the laws of descent work upon married women who had lost their husbands.⁹ Eighty percent of the delegates who took these middle-ground stances were lawyers.

Ultimately, the women’s property reform provisions were not adopted. The original votes on married women’s property rights were seventy-five yeas and fifty-five nays, with thirty lawyers voting against the reforms and sixteen voting in favor of them.¹⁰ The legal professionals, as a group, were neither more conservative nor more liberal on this subject than the convention’s overall membership.

Many today may find it interesting that an attempt to use the constitution to wipe out Indiana University altogether was made by one of the attorney delegates. Judge James W. Borden, a delegate from Allen County, made a proposal at the convention to abandon the University.¹¹ He also proposed that the income from Indiana University’s land endowment fund be distributed among the colleges of Indiana in proportion to the number of students attending them.¹² This proposal became the object of violent attack during the proceedings of the convention and was never passed.¹³

The main defender of the University, Daniel Read of Monroe County, was an educator and not a lawyer. However, some of his most important supporters on this topic were lawyers. For instance, his friend John Pettit (of Tippecanoe County), one of the three men who later sat on Indiana’s Supreme Court, offered

7. 1851 JOURNAL OF THE CONVENTION OF THE PEOPLE OF THE STATE OF INDIANA TO AMEND THE CONSTITUTION 102 (Indianapolis, A.H. Brown 1851) [hereinafter JOURNAL].

8. *Id.* at 48.

9. The fact that the provision covered property acquired by “purchase” was considered problematic in the eyes of some, largely attorneys, who thought the provision acceptable with regard to otherwise acquired property but argued against changing the common law by giving married women the right of purchase. See, e.g., 2 REPORT, *supra* note 4, at 1154-55 (remarks of Holman), 1156 (remarks of Hovey), 1162 (remarks of Bascom).

10. 2 *id.* at 1195-96.

11. 1 JAMES A. WOODBURN, HISTORY OF INDIANA UNIVERSITY, 1820-1902, at 194 (1940).

12. 1 *id.* at 123, 194; JOURNAL, *supra* note 7, at 734.

13. 1 WOODBURN, *supra* note 11, at 194.

a resolution in defense of the University at Daniel Read's request: "All trust funds, held by the state, shall remain inviolate, and be faithfully and exclusively applied to the purposes for which the trust was created." This language found its way into the final Constitution as article VII, section 7 (the education article).

Possibly the most important business at the convention—at least in the minds of many of the state's citizens and delegates—was the reformation of the legislative branch of Indiana's government. In a message he delivered on December 2, 1845, calling for the constitutional convention, Governor Whitcomb said:

The vast and growing amount of our special legislation, is a subject well calculated to arrest attention. Much the greater part of the legislature is occupied in passing local and private acts, for most of which, it is well worthy of consideration whether ample provision can not be made by a few general laws.¹⁴

Several provisions were introduced to correct the problems present in the legislature. One attorney delegate, Samuel Hall, introduced three such provisions. The first prohibited special legislation, restricting legislative acts from embracing more than one subject, and required that the subject of every act be expressed in its title. Hall also introduced a proposal to restrict the legislature from granting divorces, which was incorporated into article IV, section 22 (the section prohibiting certain types of special laws). The third provision Hall submitted was a proposal to require biennial sessions of the legislature, based on a presumption that the legislature would be able to conclude all its general, legitimate business by meeting every two years and that more frequent legislative sessions would result in undesirable special legislation.

The delegates' concern with the problems of special legislation was demonstrated by the fact that eleven other proposed sections were introduced on this issue. Five of the resolutions would have required the legislature to hold sessions only biennially, or even triennially. The other six proposals would either have prohibited special laws or required general laws. The convention eventually accepted and inserted into the constitution a provision submitted by attorney Beattie McClelland, in the form of article IV, section 23, requiring general laws where possible, and a provision introduced by attorney John Newman, in the form of article IV, section 22, prohibiting local or special laws on certain enumerated subjects. The delegates also voted favorably upon provisions compelling biennial sessions of the legislature, requiring single-subject laws, and mandating that the subject-matter content of bills be noted in their title.

Another lawyer, Thomas Smith, introduced a provision entitled "Revision or Amendments of Acts," dictating that no law be amended or revised by referring to its title and that any changes to a law must be made by publishing the entire section to be changed. This concept also found its way into the constitution eventually adopted.

Although many of the details of the construction of the constitution are

14. Thornton, *supra* note 1, at 155.

unknown due to a lack of committee meeting records, insight into the delegates' intent can be found in the published judicial opinions that were subsequently written by those delegates who became appellate judges. Because the court of appeals had not yet been formed, the only published Indiana opinions from the decades following the convention are those of the Indiana Supreme Court.

There were three delegates to the 1850-1851 Convention who later served as judges on the Indiana Supreme Court: Horace Biddle (1875-1881), Alvin Hovey (1854-1855), and John Pettit (1871-1877). The judicial opinions of these men would seem to be potential sources of unique insight into the intent of the constitution's framers; however, these three judges wrote on matters of constitutional law less frequently than might be imagined. Their presence at the convention does not appear to have given them any priority over the other judges with whom each served when it came to authoring opinions on Indiana constitutional issues. They did not write any more than their fair share of such cases. Moreover, when they did have opportunities to write on state constitutional issues, their opinions rarely implied any personal knowledge of the intentions or mental processes of the delegates.

Judge Alvin Hovey was the first of the three to serve on the Indiana Supreme Court. He was appointed by the governor on May 8, 1854—just three years after the convention ended. He served for an extraordinarily short period of time, slightly over one year, because he was defeated by Samuel Gookins in an election held in October of 1855.¹⁵ During this time, however, Judge Hovey authored several opinions that seem to incorporate his convention experiences or, at least, to reflect his constitutional values.

*Falkenburgh v. Jones*¹⁶ established the right of a defendant in forma pauperis to receive, free of charge, a trial transcript from the clerk of the court. In his discussion of article I, section 12, Judge Hovey wrote that statutes must be construed liberally in favor of the poor so that poverty is not made equivalent to a crime and so that innocent people are not convicted. Otherwise, the "part of the constitution providing that 'justice shall be administered freely and without purchase, completely and without denial' would be an empty boast, and worse than mockery to the poor."¹⁷ Another Hovey opinion more clearly suggests Judge Hovey's perspective as a convention insider. In *Langdon v. Applegate*,¹⁸ he construes article 4, section 21, which stated: "No act shall ever be revised or amended by mere reference to its title; but the act revised, or section amended, shall be set forth and published at full length."¹⁹ Judge Hovey notes that the constitutional provision means what it plainly says, rather than the alternative interpretation urged: "the act as revised, or section as amended, shall be set forth"²⁰ His opinion states:

15. See 1 LEANDER J. MONKS, *COURTS AND LAWYERS OF INDIANA* 250 (1916).

16. 5 Ind. 296 (1854).

17. *Id.* at 299.

18. 5 Ind. 327 (1854).

19. IND. CONST. art. IV, § 21 (repealed 1960).

20. *Langdon*, 5 Ind. at 330

A section so plain and clear would scarcely seem to need construction. *The convention, aware of the loose and imperfect manner in which bills were hurried through the general assembly, thought proper to throw several guards around the legislation of the state. Bills had been passed without being read; laws repealed by reference to the word, line, section or chapter; until the confusion that followed, left the statutes so imperfect and ambiguous, that the most able jurists in the state were unable to ascertain their meaning.*

To remedy these evils, the twenty-first section, with others, was adopted²¹

For authority, he does not cite his personal knowledge of the framers' intent but refers only to the published Convention Journal. Later in the opinion, however, and without citation to authority, he continues, "The delegates, aware by experience that great men are sometimes lazy, may have thought it advisable to remove every obstruction to a full understanding of bills when being enacted"²²

One case explicitly notes Judge Hovey's opportunity to write from an enhanced perspective as a former convention delegate, but this observation is not found in one of Judge Hovey's written opinions. In *Greencastle Township v. Black*,²³ the court invalidated a statute providing for township taxes to pay for schools "after the public funds shall have been expended."²⁴ The decision discussed article VIII, section 1²⁵ and article IV, section 22.²⁶ Writing the majority opinion, Judge Hovey stated:

*The object of both of these sections was to provide, not only that a 'general system of education' should be established, as was required by the constitution of 1816, but that such system should be both general and uniform; and for the purpose of more effectually securing that result, the 22d section places it beyond the power of the general assembly to pass local or special laws, 'providing for supporting common schools.'*²⁷

Judge Hovey reasoned that if this statute were found constitutional, the uniformity of the common school system would be destroyed.²⁸ Citing article X, section 1 of the Constitution,²⁹ he stressed that the statute would lead to some townships

21. *Id.* (emphasis added).

22. *Id.* at 333.

23. 5 Ind. 557 (1855).

24. *Id.* at 562.

25. This section provides for "a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all." IND. CONST. art. VIII, § 1.

26. This section prohibits special and local laws on specific topics, including the support of common schools and preserving school funds. IND. CONST. art. IV, § 22.

27. *Greencastle Township*, 5 Ind. at 561 (emphasis added).

28. *Id.* at 564.

29. This section provides for "a uniform and equal rate of property assessment and taxation."

assessing taxes, and others not, so that there would be no uniformity in either the amount of "time the school should be kept, or . . . the amount of the taxes to be paid" in the different townships.³⁰ With an implied reference to constitutional framers, Judge Hovey declared, "all the evils of the old system which *were intended* to be avoided by the new constitution—inequality in education, inequality of taxation, lack of uniformity in schools, and a shrinking from legislative responsibilities, would be the inevitable result," and adds, "we will not bend the constitution to suit the law of the hour."³¹

When this case went before the court on rehearing, Judge Hovey was no longer on the bench, and Judge Stuart, writing for the majority, observed, "Judge Hovey, who delivered the [first] opinion of the Court . . . being no longer on the bench, it is not improper to say that his position as a distinguished member of the constitutional convention, justly imparted great weight to his opinions on questions of constitutional construction."³²

Delegate John Pettit became an Indiana Supreme Court judge twenty years after the convention ended. During the six years he served on the court, however, his opinions disclose little, if any, personal reflection upon his constitution-making experience. When construing provisions of the constitution, Pettit typically used language such as, "*Is it not reasonable to suppose that* [a provision] was framed and adopted in view of . . .,"³³ or, "*Is it not reasonable to suppose that* . . . it was intended"³⁴

Judge Horace Biddle was the third Indiana Supreme Court judge who had formerly served as a delegate to the 1850 constitutional convention. His opinions, like those of Judge Pettit, contain very little express personal insight into the framers' intentions. Rather, Judge Biddle's discussions of the convention proceedings usually cite to the printed reports of the debates, much as a modern judge writing today might do. Thus, a reader of Pettit and Biddle opinions would find no indication that the authors of these opinions were actually present at, and participated in, the convention proceedings being discussed. For example, in *State v. Swift*,³⁵ after summarizing the convention's debate reports on the topic of amending the constitution, Judge Biddle writes, "We may *thus ascertain the expressed intention of the framers* of the constitution"³⁶ In only one sentence of the opinion does Biddle speak with perhaps exceptional authority regarding the drafters' intentions, and without attribution to authority. Comparing the amendment ratification language of the constitution with its provision governing the numbers needed to elect certain state officers, Judge Biddle wrote, "This

IND. CONST. art. X, § 1.

30. *Greencastle Township*, 5 Ind. at 564-65.

31. *Id.* (emphasis added).

32. *Id.* at 566 (Stuart, J., on rehearing).

33. *Lucas v. Board of Comm'rs of Tippecanoe County*, 44 Ind. 524, 545 (1873) (Pettit, J., dissenting).

34. 2 REPORT, *supra* note 4, at 562.

35. 69 Ind. 505 (1880).

36. *Id.* at 514 (emphasis added).

difference in language between the highest number of votes and a majority of all the votes is not the mere accident of composition; the words are used advisedly."³⁷ Unfortunately, little other evidence of Judges Biddle, Hovey, and Pettit's personal knowledge of the work or intentions of the framers is to be found in their opinions.

In retrospect, it may be fortunate that these judges did not attempt to exploit their roles as former delegates at the convention to engraft into judicial opinions their personal views of the "intentions of the framers." The debates themselves show that John Pettit was a vocal opponent of incorporating into the constitution various proposed references to equality.³⁸ For his part, Alvin Hovey was outspoken on his belief that only white citizens should have the right to vote.³⁹ These views were not later reflected in their judicial opinions.

Despite their lack of official leadership roles and relatively unspectacular presence as a group at the 1850-51 Indiana Constitutional Convention, lawyers and judges did make important substantive contributions—some of which non-lawyers would have been unlikely to achieve. For instance, lawyers were influential in molding article I, section 13, concerning the rights of the accused. At times they were able to convince others of the consequences of writing a provision one way or another by sharing their knowledge of the law concerning the subject at hand. At one point before its final passage, the proposed article I, section 13 contained language "restricting the trial to the county in which the offense is committed."⁴⁰ Robert Owen, a non-lawyer, wanted to remove these words, leaving it to the legislature to make the necessary provision for where trials took place, but James Rariden, a lawyer, pointed out that it is the right of the accused to be tried in the county where the offense was committed. Rariden noted that the courts had held that if the accused surrendered that right, then the state could exercise the power of removing the trial to another county.⁴¹ Future Indiana Supreme Court Judge John Pettit supported Rariden's position and stated that he had drawn up an amendment similar to the one proposed, which authorized a change of venue in criminal prosecutions upon the application of the accused.⁴²

37. *Id.* at 517 (emphasis added).

38. For instance, Pettit opposed retaining the 1816 constitution's language stating that "all men are born equally free." He argued repeatedly against this, stating that this "section in the old constitution is not true in fact, if true in theory. I do not believe it is true in theory. Men are not created equal. . . . Perhaps I should have employed the word 'persons' to make myself more clearly understood. Persons are not created equal." 2 REPORT, *supra* note 5, at 1141. Pettit also moved to strike from the constitution the entire section providing, "All elections shall be free and equal." *Id.* at 975. *See also id.* at 1378 (Pettit arguing that the purpose of proposed language concerning a defendant's right to trial by a jury "of his peers" is to "prevent such an anomaly as a white man being tried by Negroes, for instance").

39. Hovey personally submitted an amendment to a proposed universal suffrage provision that would have explicitly exempted "Negroes, mulattoes, and Indians" from its coverage. JOURNAL, *supra* note 7, at 121.

40. 2 REPORT, *supra* note 4, at 1379.

41. 2 *id.*

42. 2 *id.*

The Pettit amendment was then voted upon and passed.⁴³

Lawyers also must be given credit for significant modifications to the double jeopardy provision. It was John Newman who moved to extend this provision's protections to cover any "person," rather than just men,⁴⁴ and it was attorney Walter March who suggested restricting the constitution's ban on compelled self-incrimination to criminal prosecutions only.⁴⁵

Although we may be inclined today to think of inefficiencies in the judicial system as a relatively recent phenomenon, the convention debates suggest otherwise. There seemed to be an impatience with the court system even 145 years ago. On this issue, the lawyers and judges serving as delegates provided important insight to the Convention. One example is found in the rather caustic remarks of Mr. Watts, an attorney, during the debate on the subject of debtors' prison:

[O]f late I have been constrained to think that I never again will resort to a court to obtain justice. The only good resulting from going to court is, that it puts an end to litigation, and I will tell you how. A man resorts to court for a redress of his rights, and through the medium of some technicality, he is thrown out of court, and has the privilege of going home and working harder than ever, to make up for his losses. This is what I call putting an effectual stop to litigation. I am in favor of courts for that reason, considering that there is a manifest impropriety in going into courts of justice, for the sake of obtaining justice.

I trust that some more effectual and speedy remedy will be provided for the punishment of the fraudulent debtor, than that of entering into a suit at law.⁴⁶

In view of the experiences which lead to such criticisms, it is not surprising that the constitutional convention was also an opportunity for improvement in the judicial system, initiated by those who were most familiar with its strengths and weaknesses. It was Hiram Allen, another attorney delegate, who submitted the resolution proposing:

that the Committee on the Practice of Law and Law Reform be requested to inquire into the expediency of so amending the constitution, that it shall require the legislature, at its first session after the adoption of the new constitution, to appoint three commissioners whose duty it shall be to revise, simplify, reform and abridge the rules and practice, pleadings and forms of proceedings of courts of record in this state, and report the proceedings to the legislature for their adoption, modification or rejection.⁴⁷

43. 2 *id.*

44. 2 *id.*

45. 2 *id.*

46. 1 *id.* at 352.

47. JOURNAL, *supra* note 7, at 71.

This proposal, in large part, found its way into the final document and therefore ultimately resulted in the enactment of substantial improvements to the 1851 Constitution.

In conclusion, we discover that the Indiana lawyers and judges who served as constitution makers were not elite, privileged members of society, flaunting their knowledge and the expertise of their trade, dominating or controlling the proceedings, and imposing their values and objectives upon the convention. Rather, our professional forbearers seem to have participated as equal partners with the other delegates from all walks of Hoosier life in their grand quest for better government. While not providing the elected leadership at the convention, they were active delegates, serving as committee members, providing wisdom and insight when appropriate, proposing needed improvements, generally expressing their opinions with courtesy and respect, and facilitating compromise when the convention faced divisive issues. In numerous instances, the lawyers' speeches—even upon issues where passions and tempers appear to have been inflamed—were significantly more restrained, more courteous, and more conducive to peaceful resolution than the often more volatile rhetoric of some non-lawyer delegates. Rather than summaries of legal treatises and court opinions, the wisdom shared by the lawyer delegates often consisted simply of their knowledge of people and their general insight into life's experiences.

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NOTE

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INTRODUCTION

More than two hundred years ago, the Northwest Territory, which was comprised of present day Indiana, Wisconsin, Illinois, Ohio, and parts of Michigan and Minnesota, adopted a reception statute which brought elements of the English common law into the decisional case law of the Territory.¹ This statute was substantially similar to a provision passed by the General Convention of Virginia Representatives and Delegates in 1776,² which adopted portions of the English common law as well as statutes passed prior to 1607 in furtherance of the common law.³ The act, and those like it, are known as common law reception statutes.

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1. Act of July 14, 1795, ch. 46, 1795 Northwest Terr. Laws 191. *Short v. Stotts*, 58 Ind. 29, 31-32 (1877); *Stevenson v. Cloud*, 5 Blackf. 92, 93 (Ind. 1839).

2.

And be it further ordained, that the common law of England, all statutes and acts of Parliament made in aid of the common law prior to the fourth year of the reign of King *James* the first [1607], and which are of a general nature, not local to that kingdom, together with the several acts of the General Assembly of this colony now in force, so far as the same may consist with the several ordinances, declarations and resolutions of the General Convention, shall be the rule of decision, and shall be considered as in full force, until the same shall be altered by the legislative power of this colony.

Virginia General Convention Ordinance of May 6, 1776, ch. 5, § 6, 1776 Va. Colony Laws 33, 37.

In 1792, the Virginia General Assembly readopted this ordinance. Act of Dec. 28, 1792, ch. 28, 1792 Va. Acts 85. At present, Virginia adopts the English common law as the rules of decision in Virginia courts except where the common law is inconsistent with the bill of rights, the Virginia Constitution and acts of the Virginia General Assembly. VA. CODE ANN. § 1-10 (Michie 1995). Virginia also “saves” English statutes “insofar as [they] are consistent with the Bill of Rights and the [Virginia] . . . Constitution and the Acts of the Assembly.” *Id.* § 1-11.

3. Virginia had first given legislative recognition to the English common law in 1662. Preamble, 1661-62, Virginia Colony Session Laws, 1661 Va. Colony Laws 1, 1-2. The 1795 law of the Northwest Territory created some controversy. There was some doubt concerning its validity. This was in part because the Northwest Ordinance of 1787 only allowed the governor and judges

Variations of these statutes are in force of many states.⁴

The first part of this Article traces the background of Indiana's common law reception statute from its roots in the Northwest Territory to its present day embodiment. The second part examines the reasons for its adoption and explores the circumstances in which it was readopted. The third section examines the gap-filling application of the statute to areas of law not covered by existing law and its use as a source of equity jurisdiction, development of law merchant and conflict of laws. Finally, the fourth section examines contemporary uses of the reception statute by the Indiana Supreme Court, which has been increasingly willing to entertain arguments based on singularly Indiana documents such as the Indiana Constitution and, in one notable case, the common law of England.

I. BACKGROUND

The significance of adopting the English common law into the decisional law of Indiana is twofold. First, the English common law provides Indiana with a broad body of substantive law drawn from generations of human experience on the British Isles. As Justice Shake observed in *Helms v. American Security Co. of*

of the Territory to adopt laws (i.e., laws in force as of the date of adoption) of the original states. The editor states that the Virginia statute as adopted by the Northwest had ceased to be in force in Virginia in 1792. LAWS OF THE NORTHWEST TERRITORY 1791-1802, at 191 (Cincinnati, n.p. 1833). This would have made the 1795 law void.

The law in Virginia as it relates to English statutes did change. The Virginia Convention ordinance received the English statutes enacted prior to 1607 and gave them the force of law *until* they were altered by the legislature. Later Virginia statutes demonstrated a slight change. English statutes enacted prior to 1607 would be saved (i.e., brought into the law of Virginia) *only* if they were not inconsistent with the bill of rights, state constitution or acts of the general assembly. VA. CODE tit. 9, ch. 16, § 2 (Ritchie, Dunnivant & Co. 1860). *See also* Scott v. Lunt, 32 U.S. (7 Pet.) 596, 604 (1833) (stating that Virginia law as of 1819 was similar to law in 1776). *See also* Francis S. Philbrick, THE LAWS OF INDIANA TERRITORY ci (Francis S. Philbrick ed., Historical Bureau of the Indiana Library and Historical Department 1931); Earl D. Bragdon, The Influence of the Virginia Code on the Development of the Laws of Indiana Territory 1800-1816 (1956) (unpublished M.A. thesis, Indiana University) (on file with Indiana University School of Law—Bloomington).

4. MD. CONST. art. 5; ALA. CODE § 1-3-1 (1977); ARK. CODE ANN. § 1-2-119 (Michie 1996); CAL. CIV. CODE § 22.2 (West 1982); COLO. REV. STAT. ANN. § 2-4-211 (West 1989); FLA. STAT. ANN. § 2.1; GA. CODE ANN. § 1-1-10(c)(1) (1990); HAW. REV. STAT. ANN. § 1-1 (Michie 1995); IDAHO CODE § 73-116 (1989); ILL. COMP. STAT. ANN. 5/50-1 (West 1993); MO. REV. STAT. § 1.010 (West 1969); MONT. CODE ANN. § 1-1-109 (1995); NEV. REV. STAT. ANN. § 1.030 (Michie 1989); N.Y. STAT. § 4 (McKinney 1971); 1 PA. CONS. STAT. ANN. § 1503 (West 1995); R.I. GEN. LAWS § 43-3-1 (1995); S.C. CODE ANN. § 14-1-50 (1977); TEX. CIV. PRAC. & REM. § 5.001 (West, WESTLAW through end of 1995 Reg. Sess.); UTAH CODE ANN. § 68-3-1 (1996); VT. STAT. ANN. tit. 1, § 271 (1996); W. VA. CODE § 2-1-1 (1994); WYO. STAT. ANN. § 8-1-101 (1989).

Another method for receiving the English common law into a jurisdiction is by judicial decision. *See, e.g.,* State v. Twogood, 7 Iowa 252, 253-54 (1858).

Indiana, Inc.,⁵ “[t]he common law of the land is based upon human experience in the unceasing effort of an enlightened people to ascertain what is right and just between men.”⁶ Although the early law of England and Indiana changed significantly over time, English common law, whatever its faults, provided early Indiana judges and practitioners a baseline from which to build the jurisprudence of a new sovereign. As a practical matter, English common law, which is often reduced to the four volume Blackstone’s Commentaries as a convenient shorthand, was also far more accessible than any other source of law. In the early nineteenth century, systematic reporting of appellate court decisions and the well-stocked courthouse library had yet to be developed.⁷

Second, adoption of the common law reception statute is significant because it initiated a common law judiciary in Indiana. Neither Indiana nor the Northwest Territory was required to adopt a common law system. Instead of incorporating the common law of England, the Indiana Territory could have adopted a civil law system derived from non-British sources, such as the Napoleonic Code or Roman Law. Early Hoosier lawmakers could have taken an entirely different approach and allowed the courts to find their own common law in the Indiana wilderness. It was not a forgone conclusion that Indiana would adopt the English common law. The Virgin Islands provides an interesting example. The Virgin Islands were a Danish Territory until 1917.⁸ Under Danish sovereignty, the Virgin Islands received Danish statutory and common law.⁹ After cession to the United States, Danish law continued until 1921,¹⁰ when the Islands adopted a statute receiving the English common law.¹¹ Currently, the rules of decision in courts of the Virgin Islands are found in “the restatements of the law [as] approved by the American Law Institute, . . . as generally understood and applied in the United States”¹² Danish law still survives to some extent, particularly in the area of property relationships.¹³

5. 22 N.E.2d 822 (Ind. 1939).

6. *Id.* at 824 (citing *Kansas v. Colorado*, 206 U.S. 46 (1907)).

7. The Honorable Oliver H. Smith writes about his first fee as an attorney in Versailles, Indiana, for a case involving one neighbor boring a hole into the sugar tree of another. The aggrieved neighbor consults with young Mr. Smith. Smith relates that the case was a “plain case of *trespass quare clausum fregit*, as my Blackstone told me.” OLIVER H. SMITH, *EARLY INDIANA TRIALS AND SKETCHES* 10 (Cincinnati, Moore, Wiltach, Keys & Co. 1858).

8. Treaty on the Cession of the Danish West Indies, Jan. 17, 1917, U.S.-Denmark, 39 Stat. 1706.

9. “The Common and Statute Law of Denmark shall as hitherto be applicable in the colonies, as more accurately defined by Laws and Ordinances.” Colonial Law of Apr. 6, 1906, § 67, in *VIRGIN ISLANDS CODE ANNOTATED* (Historical Documents vol.) 22 (1995).

10. *Smith v. de Freitas*, 329 F.2d 629, 633 n.2 (3d Cir. 1964).

11. The current version of this statute is at title 1, section 4 of the Virgin Islands Code.

12. V.I. CODE ANN. tit. 1, § 4 (1995). See also *Pascal v. Charley’s Trucking Serv., Inc.*, 436 F. Supp. 455, 456 (D.V.I. 1977) (explaining that Virgin Islands courts are *bound* by the restatements, unless local law is to the contrary).

13. *Id.* §§ 6-7 (1995). See also *Smith*, 329 F.2d at 633-34 (applying Danish property law

On the other hand, because there were several cultural forces at work, the outcome could have been different. William Henry Harrison was Governor of the Indiana Territory when the reception statute was passed for a second time in 1807. It seems inconsistent for Harrison to embrace the very same common law system used by England.¹⁴ Indeed, it was by no means certain that the United States would adopt a common law at all.¹⁵ On the subject of a Federal common law Thomas Jefferson wrote to Edmund Randolph on August 18, 1788:

Of all the doctrines which have ever been broached by the Federal government the novel one, of the Common Law being in force and cognizable as an existing law in their courts, is to me the most formidable. All their other assumptions of un-given powers have been in the detail. The Bank Law, the Treaty Doctrine, the Sedition Act, the Alien Act, the undertaking to change the State laws of evidence in the State courts by certain parts of the stamp act, etc., etc., have been solitary, inconsequential, timid things in comparison with the audacious, barefaced and sweeping pretension to a system of law for the United States without the adoption of their legislature, and so infinitely beyond their power to adopt. If this assumption be yielded to, the State courts may be shut up as there will then be nothing to hinder citizens of the same state from suing each other in the Federal courts in every case, as on a bond for instance, because the Common Law they say is their law.¹⁶

However, the revolutionary break was something less than a complete split from England. As Judge Staton wrote in *Morton v. Merrillville Toyota, Inc.*,¹⁷ “[a]lthough the United States became politically emancipated from Great Britain in the late eighteenth century, it did not divorce itself culturally from the mother country. Among the cultural baggage retained by our infant nation was the English common law system.”¹⁸

It is useful to evaluate the common law in sociological terms. If the common law was cultural in nature and Indiana settlers were of English origin, it would be nearly impossible to divorce the English common law from whatever law those settlers would forge for themselves. Put another way, if the common law represented the settlers’ collective perception of what was right and just between men, any subsequent laws passed would reflect common law influence.

However, the English common law was not easily assimilated into Indiana’s legal framework. Not all Hoosier pioneers were of English or even European descent.¹⁹ In 1800, free “colored” persons and slaves made up 6.11% of the

where property rights vested prior to 1921).

14. Harrison gained notoriety by fighting American Indians who were financed by the British.

15. CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 230, 231 (1966).

16. *Id.*

17. 562 N.E.2d 781 (Ind. Ct. App. 1990).

18. *Id.* at 783.

19. U.S. CENSUS OFFICE, THE SEVENTH CENSUS OF THE UNITED STATES: 1850, at 781

population of Indiana. In 1850, more than 10% of the population had been born in a foreign country, and almost half of the population had been born in a state other than Indiana.²⁰ Additionally, Indiana has had sizable Native American tribes and their lineal descendants located within its borders, although they were not extended full rights within Indiana until after the organization of the state. Notions that one culture holds to be self-evident may not be so unequivocal to another. Indiana was not a homogenous society, least of all, one derived solely from English ancestry.²¹

The leadership of the state, however, was probably of English ancestry. On a practical level, once it was decided that Indiana was to have common law courts, some form of judicial baseline was necessary. The courts had to begin with something. And after all, as a part of the Northwest territory, the common law of England had already been extended over the state.²² The adoption of the English common law may best be characterized as a forward-looking step that not only acknowledged Indiana's cultural debts to England, but strove to build on the accomplishments of the English common law with the creation of a new one.²³

II. ADOPTING THE RECEPTION STATUTE

Whether the adoption of the English common law was routine or enlightened, William Henry Harrison signed a second reception statute into law in 1807. The 1807 act was simply titled: *An Act declaring what laws shall be in force*. The act reads:

The Common Law of England, all statutes or act of the British Parliament, made in aid of the Common Law, prior to the fourth year of the reign of King James the first, (excepting the second section of the sixth Chapter of Forty-third Elizabeth, the 8th Chapter, thirteenth, Elizabeth, and 9th Chapter, thirty-seventh, Henry eighth,) and which are of a general nature, not local to that kingdom and also the several laws in force in this territory, shall be the rule of decision, and shall be considered, as of full force, until repealed by legislative authority.²⁴

The act adopted the common law of England and acts of the British Parliament made in aid of the common law prior to 1607, as the "rule of decision" for the Indiana Territory.²⁵

(Daniel J. Boorstin ed., Arno Press 1976) (1853).

20. *Id.* at 780.

21. *See also* Act of June 16, 1852, ch. 45, 1852 Ind. Acts 129 (providing funds for printing 1000 copies of the acts of the general assembly to be printed in German).

22. Of course, the British had also extended the common law over the land that would become Indiana. The extension via the Northwest territory is relevant because it was voluntary.

23. *See infra* note 24.

24. Act of Sept. 17, 1807, ch. 24, *in* Francis B. Philbin, LAWS OF THE INDIANA TERRITORY 1801-1809, at 323 (1930) [hereinafter the 1807 act].

25. *Id.* *Alman v. Walters*, 111 N.E. 921, 923 (1916); *Short v. Shotts*, 58 Ind. 29, 32 (1877).

The act excludes the reception of three English statutes. The first excluded statute limited the recovery of costs in the Westminster courts in most causes of action.²⁶ The other two excluded statutes dealt with the legal rate of interest.²⁷ The modern statute contains the same exclusions and substantially the same language as the 1807 act.²⁸

In 1852, the common law reception statute was enacted for a third time.²⁹ The

The year 1607 was chosen because that was when Jamestown, the first permanent English settlement in North America, was founded. Many other states have chosen that date. Governor St. Clair, who was governor of the Northwest Territory in 1795, favored using the date of the Declaration of Independence, 1776.

St. Clair's favorite topic was the perfection of the common law. He favored, very sensibly, adoption as of the beginning of the Revolution; and to the first assembly of the Northwest Territory he pointed out that adoption as of the earlier date deprived the people of many improvements, such as the writ of habeas corpus and the statute of frauds.

Philbrick, *supra* note 3, at c-ci. Other states that have similar common law reception statutes have chosen dates other than 1607. N.J. CONST. art. XI, § 1, para. 3 *construed in* State v. Smith, 426 A.2d 38, 41-42 (N.J. 1981). *See also* W. VA. CODE § 2-1-1 (1984) *construed in* Markey v. Wachtel, 264 S.E.2d 437, 445 (W. Va. 1979). In *Marley*, the court found that West Virginia adopted the English common law as of 1863. *Id.* Cf. W. VA. CODE § 56-3-1 (1966) (statute giving "right and benefit" of all writs, remedial and judicial, given by any statute or act of parliament made in aid of the common law prior to [1607] of a general nature and not local to [England] . . .").

26. 43 Eliz., ch. 6, § 2 (1601) (Eng.) The statute limited the award of costs to the amount of damages in actions which concerned neither title to land, an interest in land, nor an action for battery, where the damages were less than forty shillings. *Id.* *See also* Stevenson v. Cloud, 5 Blackf. 92, 94 n.1 (Ind. 1839) (outlining subject matter of the three statutes excluded from reception).

27. 37 Hen. 8, ch. 9, (1545) (Eng.) (This act was entitled, "a bill against usury."); 13 Eliz., ch. 8 (1570) (Eng.) (reviving the 1545 statute which had been repealed). The two statutes set the highest legal rate of interest at ten percent. *See also* Stevenson, 5 Blackf. at 94 n.1.

28. A close literal reading of the 1807 act shows that 1607 was the cut-off date for the reception of *both* the English common law *and* the statutes. Section 1-1-2-1 of the Indiana Code uses the 1607 cut-off date for the statutes, but not for the English common law. IND. CODE § 1-1-2-1 (1993). The difference in the meaning stems from the lack of a comma in the present statute. The present act reads, "The common law of England, and statutes of the British Parliament made in aid thereof prior to [1607] . . ." Because there is no comma after the word, "thereof," the modifier "prior to" only modifies "statutes of the British Parliament," and does not modify "common law of England." The 1807 act has a comma before the modifier, "prior to," which means that the modifier applies to both the statutes and the English common law.

The missing comma seems to be the result of a scrivener's error in transcribing the statute as it was found in the Revised Statutes of 1852 into the present Indiana Code. This may or may not have any significance, but it may call into doubt the validity of considering post-1607 English cases as part of the Indiana common law. *E.g.* Baker v. Bolton, 170 Eng. Rep. 1033 (K.B. 1808).

29. 1 IND. REV. STAT. pt. 1, ch. 61, §§ 1-2 (1852) (§ 1 codified at IND. CODE § 1-1-2-1 (1993); § 2 codified as amended at IND. CODE § 1-1-2-2 (1993)).

1852 act is codified in the present Indiana Code. The act delineated four distinct sources of law governing Indiana. First, of equal import, were the United States Constitution and the Indiana Constitution.³⁰ Second and third were the statutes of Indiana and the United States, respectively.³¹ In making the common law of England a fourth source, the act used language almost identical to that of the 1807 act.³²

The current code provisions are almost identical to the 1852 act. (An amendment in 1978 slightly changed section two of the act. There are also punctuation changes.) Section two of the 1852 act abolished common law offenses in Indiana. Criminal offenses in Indiana are statutory.³³

With each passing year, the English common law prior to 1607 becomes more and more remote. The English common law is not consulted with the same regularity or precision as is Indiana statutory law or the common law decisions of Indiana courts. This may be in part because every passing year renders the English common law less and less accessible. Furthermore, Indiana courts may view the common law as the statute dictates; secondary to the constitutions and statutes written specifically for Indiana and the United States.³⁴ Therefore, as substantive law, the English common law is most often used for its gap-filling qualities. In this manner the common law can function as positive law.

30. *Id.*

31. *Id.*

32. *Id.*

33. IND. CODE § 1-1-2-2. Criminal defenses in Indiana, however, need not be statutory. Although Indiana recognizes a dozen or so statutory defenses, its courts have been willing to consider other defenses. *See e.g.*, *Toops v. State*, 643 N.E.2d 387 (Ind. Ct. App. 1994). In *Toops*, the Indiana Court of Appeals formally recognized the defense of necessity. *Id.* at 390. It noted that one writer had traced the roots of the defense to the Bible: "Then the mariners were afraid, and cried every man unto his god, and cast forth the wares that were in the ship into the sea, to lighten it of them." *Id.* at 388. (quoting CHARLES E. TORCIA, *WHARTON'S CRIMINAL LAW* § 90 (15th ed. 1993) (quoting *Jonah* 1:5)) This passage suggests that the Bible may be a source of the amorphous common law. *See also* George O. Dix, *The Progress of the Law*, 2 IND. L.J. 92, 93 (1926) ("... a majority of the rules, both criminal and civil, promulgated by Moses are at least in principle the law in all civilized lands.") (comparing progression and codification of laws, on the one hand, and the reflection of human experience in the biblical code of behavior, on the other)). The court also relied on a more recent Indiana common law decision, *Walker v. State*, 381 N.E.2d 88 (Ind. 1978). *Toops*, 643 N.E.2d at 389. *Walker* recognized the defense of necessity in criminal cases. Previously, the Indiana Supreme Court had recognized necessity as a defense to a tort action in *Conwell v. Emrie*, 2 Ind. 35 (1850). *Walker* left the parameters of the defense open. In *Toops*, the Indiana Court of Appeals defined the scope of the defense largely by adopting a formula crafted in the California courts. *Toops*, 643 N.E.2d at 390 (citing *People v. Pena*, 197 Cal. Rptr. 264, 271 (Cal. App. Dep't Super. Ct. 1983)).

34. IND. CODE § 1-1-2-1 (1993).

III. EQUITY, THE LAW MERCHANT AND CONFLICT OF LAWS: GAP FILLING WITH THE ENGLISH COMMON LAW

A. *Equity Jurisdiction*

Today, it is taken for granted that Indiana courts have both common law and equity jurisdiction.³⁵ However, in the mid-nineteenth century, that conclusion was not compelled by any rule of law.³⁶ In England, the ecclesiastical courts were a source of equity jurisprudence. However, the ecclesiastical courts were separate from the common law courts of England by 1607. If the reception statute adopted only common law and not equity, an argument could be constructed that Indiana courts lacked equity jurisprudence entirely.

In *Short v. Stotts*,³⁷ the defendant made just such an argument. *Short* dealt with a mutual promise to marry. On July 1, 1869, Ms. Stotts, the plaintiff, promised to marry Mr. Short. The consideration given was a similar promise made by Mr. Short to Ms. Stotts. Ms. Stotts remained "ready and willing to marry the defendant" for some time thereafter.³⁸ Unfortunately, Mr. Short never married Ms. Stotts. Instead, he married another woman two years later.

Mr. Short's failure to marry Ms. Stotts caused her to become "sick and greatly afflicted in body and mind. . . ."³⁹ She claimed damages of \$5000. At the trial, Mr. Short demurred⁴⁰ stating specifically that the "complaint contained no good cause of action. . . ."⁴¹ Mr. Short argued that such a case would have been heard in an ecclesiastical court in England. He contended that Indiana adopted only common law jurisdiction and not the powers of the ecclesiastical courts.⁴²

The court rejected Mr. Short's argument. The court opined that the ecclesiastical courts were not separated from the common law courts in England until after the Norman conquest in 1066.⁴³ Further, marriage did not move from the common law courts to the ecclesiastical courts until the pontificate of Pope Alexander III in 1159.⁴⁴

35. See IND. TR. R. 1-2.

36. Indiana courts in the mid-nineteenth century treated equity jurisdiction as deriving from the ecclesiastical courts. The roots of equity are beyond the scope of this Article. In 1852, the Indiana General Assembly spoke on the subject. 2 IND. REV. STAT. pt. 2, ch. 1, § 1 (1852). "[T]he distinction between actions at law and suits in equity . . . [is] abolished, and there shall be in this state, hereafter, but one form of action for the enforcement or protection of private rights, and the redress of private wrongs, which shall be denominated a civil action." *Id.*

37. 58 Ind. 29 (1877).

38. *Id.* at 30.

39. *Id.*

40. A demurrer is a motion similar to one made pursuant to Indiana Rule of Trial Procedure 12(B)(6).

41. *Short*, 58 Ind. at 29.

42. *Id.* at 32.

43. *Id.* at 35.

44. *Id.*

The court concluded that creation of the ecclesiastical courts in 1066 and thereafter was in derogation of common law. An entire system of English ecclesiastical courts was considered by the court as foreign to the English common law, as were laws promulgated to aid ecclesiastical jurisdiction.⁴⁵ Therefore, the court concluded that the common law courts of Indiana actually derived their jurisdiction from English courts prior to 1066 and retained equity jurisdiction from a time before such jurisdiction was transferred to the ecclesiastical courts. Thus, the court had jurisdiction to address an action for breach of mutual promise to marry.⁴⁶

The court's reasoning underscores the difficulty in determining what is received through the reception statute. The conclusion that the Indiana statute was meant to adopt the common law system as it actually existed in 1607 would include the conclusion that Indiana courts did *not* have equity jurisdiction. Regardless, the court's decision shows that it was willing to use the flexible common law to arrive at the result it felt appropriate. This is a pattern that is repeated in many of the early decisions applying the common law reception statute. Equally interesting is the fact that at that time in Indiana's history, a defendant thought he could successfully demur to the complaint on the ground that the Indiana common law courts did not have the authority to hear matters that the ecclesiastical courts would have heard in 1607. It is possible, of course, that Mr. Short was without any other credible argument and was attempting to avoid judgment in whatever manner he could.⁴⁷

In *Henneger v. Lomas*,⁴⁸ the court found that it had equity jurisdiction, albeit with a vastly different rationale. In *Henneger*, a wife brought suit against her former husband for her seduction when she was sixteen years of age. The court agreed with out-of-state precedent that a married woman could not maintain an action against her husband for torts he may have committed against her in the course of their marriage. The plaintiff's right to sue the man who seduced her was extinguished by their subsequent marriage,⁴⁹ and she could not maintain such an action even after a divorce.⁵⁰

Ms. Henneger, however, argued that her marriage was ended by an annulment. She asserted that her divorce was granted on the ground of fraud. In equity, fraud was a ground for an annulment and not a statutory ground for a divorce. Mr. Lomas argued that the end of their marriage would have had to be a divorce because the divorce statute did not allow courts to perform annulments.⁵¹ The Indiana Supreme Court found that trial courts did have the ability to declare de

45. *Id.* at 36.

46. *Id.*

47. Not all uses of the reception statute are in good faith.

48. 44 N.E. 462 (Ind. 1896).

49. *Id.* at 463; Indiana courts finally did away with the hoary notion of spousal tort immunity in *Brooks v. Robinson*, 284 N.E.2d 794 (Ind. 1972).

50. *Henneger*, 44 N.E. at 465.

51. *Id.* at 465-66.

facto annulments⁵² due to Indiana's reception of the common law.⁵³ The court concluded that the powers of the ecclesiastical courts were part of the common law of England in 1607 and therefore adopted by the reception statute. This decision is in stark contrast to that of *Short v. Stotts*.⁵⁴

In *Short*, the court concluded that ecclesiastical courts were not part of the common law of England but that Indiana courts retained the powers of the ecclesiastical courts from a time before the courts were separated.⁵⁵ In *Henneger*, the court arrived at the same conclusion by simply asserting that the powers of the ecclesiastical courts were common law powers and thus grafted into the Indiana common law.⁵⁶

The difference between the two cases illustrates the confusion about the meaning of the common law reception statute. One problem relates to timing. Does the reception statute accept the theoretical unfettered common law of 1607, or does it refer to the actual practice in England in 1607? Another problem is whether the common law was *binding* authority or able to be discarded or modified as judges saw fit when developing Indiana's common law.⁵⁷ In *Henneger*, it appears that the decision was based on an understanding that Indiana courts would provide exclusive remedies for all cases, not just those at law. The common law did not compel the conclusions in the equity cases above. The divergent paths to the same conclusion suggest the effect of English common law is more than advisory but less than *stare decisis*.⁵⁸

B. Law Merchant

In other cases the court applied the English common law as a body of substantive law. For example, early Indiana courts occasionally turned to the custom of merchants, or *lex mercatoria* or law merchant, for substantive law on

52. Equity jurisdiction and jurisdiction to annul marriages are now provided by statute. IND. CODE §§ 33-5-25-5, 33-5-8-5, 33-5-26-6, 33-5-32.5-4, 33-5-39-7 (1993).

53. *Henneger*, 44 N.E. at 466.

54. 58 Ind. 29 (1877).

55. *Id.* at 35-36.

56. *Henneger*, 44 N.E. at 466.

57. "The common law has always had the inherent capacity to develop and adapt itself to current needs; indeed, if this were not true it would have withered and died long ago rather than have grown and flowered so gloriously." *Collopy v. Newark Eye & Ear Infirmary*, 141 A.2d 276, 284-85 (N.J. 1958). "But this does not mean that common-law rules are forever chiseled in stone, never changing. The common law is dynamic, evolves to meet developing societal problems, and is adaptable to society's requirements at the time of its application by the Court." *Williamson v. Old Brogue, Inc.*, 350 S.E.2d 621, 623 (Va. 1986).

58. See *Campbell v. Criterion Group*, 605 N.E.2d 150, 156 (Ind. 1992) (citing *Union Trust Co. v. Curtis*, 105 N.E.2d 562 (Ind. 1914)) ("Finally, the traditions of equity have force in Indiana under Ind. Code Ann. § 1-1-2-1 just as do those of the common law proper."). Another question is whether the received common law has the force of a statute. See *infra* notes 90-101 and accompanying text.

subjects the legislature had not yet delineated.

Early Indiana Supreme Court decisions define *lex mercatoria* simply as the “custom of merchants.”⁵⁹ The laws of the law merchant emerged as a quick and efficient method to resolve differences between merchants from different legal systems. For many years the *lex mercatoria* was an important link between the British Isles and continental Europe. Modern *lex mercatoria* is international in flavor and is more comprehensive than its 15th century predecessor.

Litigants in Indiana occasionally sought refuge in the law merchant from transactions not covered by statute. In *Bullitt v. Scribner*⁶⁰ the court was called upon to determine whether the law merchant was within the jurisprudence of Indiana but declined to do so on the facts of the case. *Bullitt* dealt with the assignment of a note executed by Elliott and payable to Scribner. Scribner assigned the note to Bullitt. Bullitt sought to collect on the note from Elliott and successfully sued Elliott on the note. Elliott was insolvent, and so Bullitt sued Scribner in *assumpsit* for satisfaction of the note.

As part of his defense of *nonassumpsit*, Scribner asserted that Bullitt failed to comply with the law merchant because he failed to give Scribner adequate notice of Elliott’s default. The court concluded that the law merchant did not place promissory notes, the subject of the suit, on the same footing as inland bills of exchange.⁶¹

Inland bills of exchange were subject to the notice requirements of the law merchant. Ordinary promissory notes were not. The court concluded that promissory notes, not raised to the level of commercial paper in England until after 1607, did not carry with them the same formalities as inland bills. Therefore, the court affirmed that the plaintiff had an action against the endorser at common law and that Bullitt had brought suit in the appropriate fashion.⁶²

Two years later, in *Piatt v. Eads*,⁶³ the Indiana Supreme Court once again had occasion to contemplate the role of the law merchant in Indiana jurisprudence. The court first asked whether the law merchant was part of the common law of England and concluded that “[t]he whole current of authorities, from the commencement of the history of our system of jurisprudence down to the present day, goes to establish the doctrine that the custom of merchants is and always has been regarded as a part of the common law of England.”⁶⁴

The court determined that the “custom of merchants” was a law of a general nature, not local to the kingdom, but comprehended within the law of Indiana.⁶⁵ The court found support for this contention in the language of an Indiana statute which “provides that notes payable at a chartered bank shall have the same effect

59. *Piatt v. Eads*, 1 Blackf. 81, 82 (Ind. 1820); *Bullitt v. Scribner*, 1 Blackf. 14, 14–15 (Ind. 1818).

60. 1 Blackf. 14 (Ind. 1818)

61. *Id.*

62. *Id.* at 15.

63. 1 Blackf. at 81 (Ind. 1820).

64. *Id.* at 82.

65. *Id.*

and be negotiable in like manner as inland bills of exchange according to the custom of merchants."⁶⁶

Although the law merchant is important mostly for historical reasons, the UCC does contain a provision that includes the law merchant for gap-filling purposes, indicating its influence on our substantive law.⁶⁷ The legislature, through selective adoption of the UCC, provided that the judiciary need not wrestle with the law merchant in routine commercial paper or secured transactions matters.

The two cases dealing with the law merchant are significant because they show the deference early Indiana courts gave the common law as inherited from England. The common law, in this context, is not a litany of platitudes linked together and used as a persuasive source of law. With respect to the law merchant, the common law is technical in nature and demanding. In the reported decisions the courts did not apply the law merchant often, but they did find occasion to use it as a determinative body of law.

C. *Conflict of Laws*

The common law reception statute has also been used to ease problems that might otherwise be issues of first impression. Before the development of comprehensive conflict of laws rules, courts used the reception statute as a practical tool to apply the laws of other states. Today, the application of the law of other states is not a complicated question in Indiana, at least on a procedural level. The Indiana Code requires that Indiana courts "shall take judicial notice of the common law and statutes of every other state, territory and jurisdiction of the United States."⁶⁸

Before this act was passed in 1937, application of the law of another state took one of two approaches. The first was to require that statutory law of another state to be offered into evidence.⁶⁹ Then the court was required to judicially notice it.⁷⁰ The second method was to presume that the other state had the same common law origins as Indiana and thus the same decisional law. Then, the court would take judicial notice of the other state's common law.⁷¹

66. *Id.*

67. *See* IND. CODE § 26-1-1-103 (1993).

68. IND. CODE §§ 34-3-2-1 to 7 (1993) (adopting the Uniform Judicial Notice of Foreign Law Act). *See also* IND. R. EVID. 201(b).

69. 2 IND. REV. STAT. pt. 2, ch. 1, § 285 (1852).

70. *Id.*; *Blystone v. Burgett*, 10 Ind. 28, 32 (1857).

71. The law in this area seemed to undergo some fluctuation. In *Blystone*, the court found that the rule of "presuming the existence of the common law in a sister state, is very much shaken, if not entirely overthrown . . ." *Blystone*, 10 Ind. at 30. However, a later decision of the Indiana Supreme Court stated, "In the absence of any averment [pleading] upon the subject, the courts of this state will indulge the presumption that the common law is in force in [other states] . . ." *Pennsylvania Mut. Life Ins. Co. v. Norcross*, 72 N.E. 132, 136 (Ind. 1904). If there was no pleading outlining the decisional law of that state, then "[the courts] will judge what the law is for themselves . . ." *Id.* If another state's law was applicable to the case, Indiana courts would follow

In *Blystone*, the court declined to presume that Illinois retained the English common law with respect to chattel mortgages. In this case, Blystone sought to recover oxen from Burgett. Burgett bought the oxen from Yeatly, although the oxen were mortgaged to Blystone. The mortgage was executed and recorded in Illinois.

The court was called upon to determine whether the oxen should go to a note-holder from another state or to a native bona fide purchaser.⁷² The validity of the mortgage depended on whether the court would take judicial notice of Illinois law or presume that the common law prevailed in another state.⁷³ The court was reluctant to presume that the common law still prevailed in Illinois on this matter.⁷⁴ Chattel mortgages were unknown at common law,⁷⁵ and such a presumption would immediately end Blystone's claim to the oxen.⁷⁶

The court stated, however, that had "the laws of Illinois been brought judicially to the notice of the Court in this case . . ." so that the court could be sure of the validity of the mortgage, it would have had no difficulty in sustaining the mortgage.⁷⁷ Blystone's mistake was not brining the proper law to the court's attention.

In *Krouse v. Krouse*,⁷⁸ the Indiana Court of Appeals decided to apply Indiana law instead of the foreign jurisdiction's law. In this case, the court had occasion to consider an agreement, executed in California, between a husband and wife in which the husband pledged to repay \$150 that he had apparently borrowed from his wife. Mr. Krouse's estate, as a defense, argued that the contract was the product of duress and that Indiana courts were to presume the common law prevailed in other states. Specifically, the defense argued that the court should presume the common law defense of duress prevailed in California. The estate also argued that at common law a wife would have no contractual recourse against her former husband.⁷⁹ Indiana law, on the other hand, did provide a remedy.⁸⁰

The court, in considering Mr. Krouse's claim, traced the admission of California into the United States. The court noted that before its "purchase"

the decisional law of that state as a matter of comity. *Clark v. S. Ry. Co.*, 119 N.E. 539, 547 (Ind. App. 1918). Of course, that decisional law would have had to be "brought to [the court's] attention." *Id.*

72. *Blystone*, 10 Ind. at 29 (using the terms "innocent purchasers" and "*bona fide* creditors without notice.")

73. *Id.* at 30.

74. *See supra* note 71.

75. The plaintiff argued that because he attempted to foreclose the mortgage in Indiana, it should be presumed that the mortgage was *executed* in Indiana. The court declined to disregard the plain language of the mortgage instrument which showed that it had been executed in Illinois. *Blystone*, 10 Ind. at 31.

76. *Id.*

77. *Id.* at 32.

78. 95 N.E. 262 (Ind. App. 1911).

79. *Id.* at 263.

80. *Id.* at 264.

California had been a part of Mexico and that its judicial system was "that of Roman law, modified by Spanish and Mexican legislation."⁸¹ Thus, the court determined, the presumption that common law prevailed in California was overcome by historical fact.⁸² The court therefore determined that California did not have a system based on the English common law but declined to take judicial notice of the statutory law in California.⁸³ The court then concluded that it would apply Indiana law to resolve the dispute. The court also rejected the defendant's prayer of duress and affirmed the trial court's ruling in favor of the plaintiff.⁸⁴

Indiana courts used the common law as a bridge between states when it was necessary to apply the law of another state, yet retained common sense as to whether outdated notions of the common law could be presumed to be the law of another state. One cannot help but wonder if the *Blystone* court was aware that Illinois had passed laws allowing for chattel mortgages. In short, the courts valued the significance of the common law but also recognized that it was not particularly suited to certain modern endeavors. The judicial notice taken of the history of California, but not of its laws, underscores the previously suggested notion that litigants and even courts probably did not have access to all decisions from other states. Although courts of the time did cite cases from other states, they did not cite cases from all states, and sometimes they did not take judicial notice of statutes from other states. This suggests a cautious view towards sources of foreign law that were possibly unreliable. Today, courts have access to the laws of other states and even countries with a stroke on a keyboard.

IV. MODERN APPLICATION

The modern application of the common law reception statute must be

81. *Id.* (quoting *Fowler v. Smith*, 2 Cal. 568 (1852)). The court took judicial notice of history and the California Constitution.

82. *Id.*

83. It is important not to read *Krouse* too broadly. Part of the problem seems to be the fact that Mr. Krouse did not offer California law into evidence. (It appears from the opinion that he did not.) Had he done so, the Full Faith and Credit Clause would have forced the Indiana court to observe California law. A federal statute in effect at that time also commanded this result. Act of May 28, 1790, ch. 11, 1 Stat. 122 (current version at 28 U.S.C. § 1738 (1994)). If Mr. Krouse did offer evidence of California law, the *Krouse* decision is seriously flawed. It seems that if a litigant wanted the law of another jurisdiction, the litigant had the burden of bringing that law to the court's attention.

84. The counsel for the defendant argued that the defendant, who was an attorney, had been deprived of his clothing by his wife following a severe earthquake and fire in San Francisco. Counsel argued that the defendant needed good clothing to properly undertake his duties as an attorney and that he signed the note to get his clothing from his wife. The court concluded that since there had been no showing that the defendant actually had any clients, there had been no showing that the attorney needed to wear fine vestments. And finally, the court reasoned that wearing old clothing would not be inappropriate following a natural disaster on the order of the 1906 San Francisco earthquake. *Krouse*, 95 N.E. at 265.

understood in light of other trends within Indiana courts. Perhaps the most significant trend within the last decade is the rediscovery of the Indiana Constitution and its Bill of Rights. Adopted in 1851, the Indiana Constitution has always been the backbone of Indiana jurisprudence. However, the Indiana Supreme Court has been increasingly willing to forge distinctly Indiana jurisprudence in recent years. The trend may have begun with an article by Justice Brennan published some two decades ago.⁸⁵ The Brennan article is a celebration of American federalism, suggesting the replication of the Warren Court's activism on the state level. Ten years after the Brennan article, Justice Robert F. Utter of the Washington Supreme Court and his clerk, Sanford E. Pitler, wrote an article published in the *Indiana Law Review* suggesting techniques for preserving and properly raising state constitutional arguments.⁸⁶ Finally, in his article *A Second Wind for the Indiana Bill of Rights*,⁸⁷ the Chief Justice of Indiana, Randall T. Shepard, highlighted Indiana's history of using its own constitution independent of the federal constitution and called for more effective advocacy of Indiana constitutional claims.⁸⁸

Although the English common law is a distant fifth to the state and federal constitutions and statutes, when construing the Indiana Constitution, jurists sometimes use the intent of the framers to back the guarantees of that constitution. Both the 1851 Constitution and the third, and present, common law reception statute were passed at roughly the same time. There is little doubt the common law of England was on the minds of the delegates to the constitution.⁸⁹ When the court attempts to discern the intent of the framers of the Indiana Constitution, the English common law, to the extent it was understood in the mid-nineteenth century in Indiana serves as a useful tool.

In the remarkable case of *Campbell v. Criterion Group*⁹⁰ the Indiana Supreme Court used the English common law to refine its interpretation of the Indiana Constitution. In *Campbell*, the court authorized in forma pauperis appeals to the

85. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

86. Robert F. Utter & Sanford E. Pitler, *Presenting a State Constitutional Argument: Comment of Theory and Technique*, 20 IND. L. REV. 635 (1987).

87. Randall T. Shepard, *Second Wind for Indiana Bill of Rights*, 22 IND. L. REV. 575 (1989).

88. *Id.* at 584-586.

89. 1 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA 722-24 (Indianapolis, A.H. Brown 1850). At the 1850 debates, Mr. Tague offered a resolution to abolish the common law of England. Tague gave a short synopsis of the reasons he and his constituents thought the English common law should be abolished. At the conclusion of his remarks Mr. Nave rose and moved to delay the vote on the resolution until such time as Tague would have "time to read and understand what the common law is." *Id.* at 723. That motion being denied, various amendments were offered including amendments to "forever abolish logic and the mathematics," to abolish "Queen Victoria and the Fugitive Slave law" to abolish "the chills and fever" and finally to notify "Her British Majesty, by telegraph, that the common law in England is abolished." *Id.* at 723-24.

90. 605 N.E.2d 150 (Ind. 1992).

appellate courts in Indiana for civil cases. In a unanimous opinion, Chief Justice Shepard recognized the right to pauper counsel based upon statutory permission, common law power, and constitutional direction.⁹¹ In its opinion, the court weaved together the common law of England with that of Indiana. The court detailed Indiana's long tradition of accommodating the indigent within the legal system. It sought to extend what Justice Stewart in *Lane v. Brown*⁹² recognized as Indiana's "conspicuously enlightened policy in the quest for equal justice to the destitute."⁹³ With this guiding purpose, the court found that an act of British Parliament⁹⁴ was made in aid of the common law and that it authorized the court to permit pauper appeals in the appropriate case.⁹⁵ The court further reviewed Indiana constitutional and statutory authority and determined that the English statute in aid of the common law which provided authority for pauper civil appeals was the law of Indiana.⁹⁶

There are occasions when the courts have not been receptive to ancient English statutes. *Hosts, Inc. v. Wells*⁹⁷ provides a spirited decision on an award of attorney's fees. Mr. and Mrs. Wells sought satisfaction on a promissory note executed and delivered to them by Hosts, Inc. The trial court granted summary judgment for the Wells and awarded them \$5000 as well as \$1800 in attorney's fees. The trial court did so under authority of the Statute of Gloucester⁹⁸ which the court concluded had been adopted through the common law reception statute.

The court of appeals, by a two to one vote, rejected the trial court's incorporation of the statute into Indiana law. The majority decision lists ten Indiana cases to the effect that "a successful litigant is not entitled to recovery of his attorney fees."⁹⁹

Judge Staton, in dissent, argued that the cases established only that earlier courts were unaware of any authority to award attorneys fees.¹⁰⁰ Judge Staton further observed that Indiana law did not provide for automatic repeal of unused laws through disuse or non-enforcement.¹⁰¹ Moreover, he argued that the Statute of Gloucester had the force of an act of the Indiana General Assembly because it had been brought into the law of Indiana by statute. Therefore, he concluded that

91. *Id.* at 159.

92. 372 U.S. 477 (1963).

93. *Campbell*, 605 N.E.2d at 159 (citing *Lane*, 372 U.S. at 478).

94. 11 Hen. 7, ch. 12 (1494) (Eng.).

95. *Campbell*, 605 N.E. 2d at 155-56.

96. *Id.* at 156-58.

97. 443 N.E.2d 319 (Ind. Ct. App. 1982).

98. Statute of Gloucester, 6 Edw., ch. 1, §§ 1-2 (1278) (Eng.).

99. *Hosts*, 443 N.E.2d at 321.

100. The ten decisions listed by the majority may have been decided on the *mistaken assumption*, not the *determination* that, Indiana law did not generally allow the award of attorneys fees. *Id.* at 324 (Staton, J., dissenting). See *Printing Ctr. of Texas, Inc. v. Supermind Publ'g Co.*, 669 S.W.2d 779, 782 (Tex. App. 1984, no writ) (court proceeded on "doubtful assumption" that UCC controlled decision because the parties tried suit as if UCC applied.).

101. *Hosts*, 443 N.E.2d at 324 (Staton, J., dissenting).

the Statute of Gloucester was still in effect in Indiana as it had never been explicitly overturned or disapproved by any Indiana common law court.¹⁰²

The original 1807 reception act included the English common law as decisional law. Therefore, the Statute of Gloucester would be decisional, rather than statutory, law. As such, it could be repealed without specific reference to the act being repealed. Judge Staton's observation that those decisions disallowing the award of attorneys fees were done without consideration of the English common law has merit.

What Judge Staton's dissent provokes, however, is the threat of a flood of old English statutes and common law principles, less well known than the Statute of Gloucester, being suddenly rediscovered as positive law. Surely there are some hoary, old notions in the English common law that have not been specifically stricken from the canon.

It may be impractical for practitioners in Indiana to familiarize themselves with the intricacies of the English common law. However, the decision in *Campbell* makes it plain that the present court is willing to consider and construe the English common law in the appropriate case.

CONCLUSION

The contrast between Judge Staton's dissent in *Hosts* and the Indiana Supreme Court decision in *Campbell* underscores the continuing relevance and the selective application of the English common law. The English common law exists in Indiana as surely as the courts have the common law power to make law. It is tempered by its age and the nature of common law jurisprudence. The common law of a society may embody or model its commonly held ideas or aspirations about the way the judicial system should work and the way society should order itself. It is without the ink and paper permanence and stricture of statutory law, and lasts only so long as its core notions are supported and commonly believed. The English common law is useful as a tool of construction for both the constitution and statutory law, as a gap-filler, and as a theoretical bedrock to the common law system. The common law may be increasingly used as a tool to ascertain the intent of the framers of the constitution. It will be used less and perhaps never again to fill gaps in existing law. But it will always mark the beginning of Indiana's common law courts and the starting point of a common law system.

102. *But cf.* *Northwest Calf Farms, Inc. v. Poirier*, 499 N.E.2d 1165 (Ind. Ct. App. 1986). In *Northwest Calf Farms*, Judge Staton wrote an opinion disallowing an award of attorney's fees based on another Act of Parliament. 17 Rich. 2, ch. 6 (1393) (Eng.).

